79-190

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

GENERAL ATOMIC COMPANY,
Petitioner

v.

UNITED NUCLEAR CORPORATION and INDIANA AND MICHIGAN ELECTRIC COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

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OPINIONS BELOW

The opinions of the New Mexico Supreme Court (Pet. App. A, pp. 1a–42a, *infra*)[1] and of the District

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[1] The opinion was issued on May 7, 1979, and was corrected by the New Mexico Supreme Court, *sua sponte*, by order of May 18, 1979. The opinion is reproduced at Pet. App. A as corrected. See also note 13, *infra*.

Court for the First Judicial District, Santa Fe County, New Mexico (Pet. App. B, pp. 43a–51a, *infra*) are not reported.

JURISDICTION

The judgment of the New Mexico Supreme Court, affirming the "partial final judgment" of the District Court (Pet. App. C, pp. 52a–53a, *infra*), was entered on May 7, 1979. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether petitioner, having been unconstitutionally enjoined from instituting federal arbitration for almost 19 months until the trial court's illegal injunction was reversed by this Court (434 U.S. 12) and having demanded arbitration on the day after the unlawful injunction was removed, may have its right to federal arbitration frustrated by the enjoining court's decision to proceed with a trial on the ground that petitioner had "waived" federal arbitration by failing to demand arbitration while the injunction was in effect.

2. Whether the trial court's finding that petitioner had "waived" its federal arbitration rights satisfied

(a) the substantive standards for waiver prescribed by the Federal Arbitration Act, as judicially interpreted and applied, and

(b) the procedural standards prescribed by the Due Process Clause of the Fourteenth Amendment and by the Federal Arbitration Act in view of the judge's denial of GAC's request for an evidentiary hearing.

3. Whether a party which has been unconstitutionally enjoined from instituting arbitration under the Federal Arbitration Act should, upon reversal of the illegal injunction, be restored to the *status quo ante*, including the invalidation of all orders entered by the state trial judge after he unlawfully assumed exclusive jurisdiction over the dispute.

4. Whether the Federal Arbitration Act permits state courts, rather than arbitration panels, to determine if a party entitled to arbitration has delayed in demanding arbitration and thereby waived the right to arbitrate.

5. Whether a dispute over an interstate supply contract with an arbitration clause is exempt from the Federal Arbitration Act and rendered nonarbitrable because the party opposing arbitration asserts state antitrust defenses to performance of the contract, objects to the arbitration of such defenses, and contends that they are "intertwined" with concededly arbitrable issues.

STATUTES INVOLVED

Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, provides:

> § 3. ***Stay of proceedings where issue therein referable to arbitration***
>
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement,

shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides:

> § 4. ***Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination***
>
> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration

agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

STATEMENT

Introduction

This is another chapter in the struggle of General Atomic Company ("GAC") to have a billion-dollar dispute with United Nuclear Corporation ("UNC") resolved in arbitration under the Federal Arbitration Act, as provided in the contract of the parties, rather than in the state courts of New Mexico—the forum in which UNC initiated proceedings and to which it has tenaciously confined this dispute for the past four years. On two earlier occasions, this Court has sum-

marily reversed rulings of the Santa Fe trial judge which denied GAC access to federal forums, including federal arbitration. *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977); *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978). A nationally distinguished arbitration panel, consisting of a former Chief Justice of the Supreme Court of Illinois, a former Secretary of Labor, and a well-known professor of law,[2] was convened following this Court's second decision, and the panel has now conducted 7 days of hearings and received lengthy submissions and voluminous exhibits from the parties relating to numerous preliminary questions. UNC has made a number of unsuccessful efforts in federal courts to prevent, terminate or limit the arbitration. It has succeeded only in this case, obtaining a decision from the Supreme Court of New Mexico which again endeavors to preserve exclusive jurisdiction over this dispute in the New Mexico courts, this time on the ground that GAC has "waived" its right to arbitrate by its compliance with the preliminary injunction which this Court invalidated. UNC has argued to the arbitration panel and to federal courts that the New Mexico decision finding that arbitration was "waived"—made in the context of a request for a stay of the trial—totally forecloses the arbitration remedy on grounds of *res judicata* and is binding on the parties. Thus, unless this Court reverses the judgment below, the New Mexico courts will again have effectively "interfered with" and "impeded" GAC's efforts to have its dispute with UNC considered and decided by a federal arbitration panel.

[2] The members of the arbitration panel are Walter V. Schaefer, W. Willard Wirtz and Julian H. Levi.

The effect of the New Mexico court's interference with federal arbitration is particularly damaging in light of what occurred in the New Mexico courts while access to federal forums was being unconstitutionally denied. During the almost 26 months between April 2, 1976, when the unconstitutional injunction was first issued, and May 30, 1978, when this Court effectively vacated the trial judge's second invalid order, the Santa Fe judge issued an extraordinary discovery order directing that documents and information, held in Canada by a subsidiary of a non-party and producible only in violation of Canadian criminal law, be made available to UNC. Because the documents and information were not produced by GAC, the Santa Fe judge terminated the trial before the plaintiff's case had been concluded and entered a default judgment against GAC in favor of UNC and the third-party defendant, Indiana & Michigan Electric Co. ("I&M").

This remarkable turn of events, culminating with the entry of a billion-dollar default judgment because of a party's inability to produce documents or information located abroad, would not have occurred if GAC had been permitted to demand federal arbitration in the pretrial stages of the Santa Fe litigation or even if GAC had been permitted to pursue the demand for federal arbitration served and filed immediately upon dissolution of the unconstitutional injunction. Instead of staying his trial on GAC's timely request, the Santa Fe judge issued findings that GAC had "waived" its rights and even entered a second unlawful order "staying" the federal arbitrations. The result of this sequence of rulings regarding arbitration by the Santa Fe judge—none of which was disturbed by the New Mexico Supreme Court—is that GAC has had neither the federal arbitration provided in the

contract between GAC and UNC nor a trial on the merits in the state court. Instead, an enormous judgment has been entered against GAC, and that judgment, as well as all other rulings made by the Santa Fe judge, are being invoked by UNC as *res judicata* before the arbitration panel and before federal courts in New Mexico and California where UNC has been endeavoring, in a barrage of lawsuits, to delay, hinder and otherwise defeat GAC's access to federal arbitration.

1. *The Origins of the Litigation*

A long-term supply agreement signed in 1973 obligated UNC to deliver approximately 24 million pounds of uranium at specified contract prices to GAC by the mid-1980's.[3] Although the market price for uranium had been relatively stable for several years prior to 1973, it rose suddenly in 1974 and 1975, and has been rising gradually since then.[4] By mid-1975, UNC was seeking to avoid continued performance under the 1973 agreement. UNC instituted an action in the New Mexico state courts in August 1975

[3] Between 1965 and May 1971, UNC committed itself directly to four utilities to sell in excess of 25 million pounds of uranium. UNC's utility agreements (in the form of three formal contracts and two letter agreements) were assigned to GAC's predecessor in 1971. In conjunction with that assignment, UNC agreed in 1971 to supply to GAC's predecessor the uranium necessary to fulfill those utility agreements. The 1973 Supply Agreement superseded the 1971 Agreement. It called for UNC to supply the quantity of uranium that was contemplated in 1973 to be necessary to perform those utility agreements, substantially in accordance with the terms and conditions, including price, of those agreements.

[4] UNC stated in March 1978—after the New Mexico trial court had rendered judgment in its favor—that instead of selling the uranium involved at the average contract price of $11 per pound, the judgment would enable it to sell at "current or future market prices." It noted that the market price was then approximately $43 per pound. See Petition for Writ of Certiorari, *General Atomic Co.* v. *Felter*, No. 77-1269, p. 66a. In a recent interview published in *The New York Times*, UNC's Chief Executive Officer has predicted that the price of uranium will rise to $70 to $80 per pound by 1983. See *The New York Times*, May 17, 1979, p. D4. UNC's calculation of current market prices brings the value of the default judgment to approximately one billion dollars, and the prediction regarding future market prices means that it may be worth substantially more.

for a declaratory judgment that the 1973 Supply Agreement was either wholly unenforceable or subject to reformation.

2. *UNC Resists Removal to Federal Court.*

Named as defendants in UNC's action were GAC (which is a partnership), as well as its constituent partners, Gulf Oil Corporation ("Gulf") and Scallop Nuclear, Inc. The complaint alleged that before GAC was organized, Gulf had engaged in fraud, breached its fiduciary duty, and violated state antitrust statutes in its dealings with UNC. It also alleged that performance of the agreement was commercially impracticable. Since diversity of citizenship existed between Gulf and UNC, Gulf removed the entire case to federal court. UNC moved for a remand. After it appeared during oral argument that the case might not be remanded, UNC avoided federal jurisdiction by voluntarily dismissing the pending action pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure.[5]

[5] The New Mexico Supreme Court erred in its recitation of this event by declaring (and emphasizing) that GAC "opposed" the dismissal of the case in federal court (p. 4a, *infra*). GAC had no opportunity to oppose the dismissal. Under Rule 41(a)(1), UNC had an absolute right, since the defendants had not yet answered, to dismiss the action by simply filing a notice—which is precisely what it did.

A second state-court proceeding—the present case—was begun by UNC on December 31, 1975, the same day on which UNC dismissed the action in federal court. To avoid removal, only GAC was named as a defendant, but the complaint was otherwise identical to the one filed in August 1975. Since the 1973 Supply Agreement subjected to arbitration "any disputes, which may arise between the parties during the course of this Agreement,"[6] GAC prefaced preliminary motions filed during the first months of the litigation with an explicit statement that it was not waiving its right to demand arbitration.[7]

3. *The State Court Unlawfully Assumes Exclusive Jurisdiction.*

UNC, however, took steps to restrict the dispute to state court. Expressing concern that GAC would seek to join it in federal court proceedings involving the utilities to whom uranium had originally been promised by UNC,[8] UNC secured an *ex parte* temporary

[6] The text of the arbitration clause appears as Appendix D to this Petition, p. 54a, *infra*.

[7] A similar reservation of the right to seek arbitration was included in an interpleader complaint filed by GAC in federal court in New Mexico in January 1976. The interpleader suit was dismissed for lack of interpleader jurisdiction, and the dismissal was affirmed by the Court of Appeals for the Tenth Circuit, which recognized, however, that GAC was placed "in a most difficult trap" and that it faced the real possibility of "conflicting adjudications." *General Atomic Co.* v. *Duke Power Co.*, 553 F.2d 53, 56 (1977). This Court also observed, in its first opinion, that the New Mexico litigation left GAC "exposed to a substantial risk of inconsistent adjudications in separate proceedings." 434 U.S. at 18, n.11.

[8] Indiana & Michigan Electric Co. ("I & M"), the other party in this case, had initiated a lawsuit in the United States District

restraining order from the state court judge, Edwin L. Felter, prohibiting GAC from "instituting suit or filing a third-party complaint" against UNC in any other forum.

GAC thereafter notified UNC that it expected to join UNC in a federal arbitration pending with Duke Power Co., one of the utilities. Accordingly, in a hearing, held on March 24, 1976, on whether the preliminary injunction should issue, UNC asked the court to extend the prohibition entered nine days earlier against litigation in other forums to cover not only judicial proceedings, but arbitrations as well. On April 2, 1976, following announcement of his decision in a letter of March 29,[9] the Santa Fe judge entered the first of the injunctions subsequently held by this

Court for the Southern District of New York against GAC and its partners. *Indiana & Michigan Electric Co.* v. *Gulf Oil Corp.*, No. 76 Civ. 881 (S.D.N.Y.). I & M refused to join UNC, and that action was ultimately dismissed on January 5, 1977, when District Judge Frankel concluded that to continue the lawsuit without UNC as a party would violate "equity and good conscience." Thereafter, I & M was joined as a party in the New Mexico court and has aligned itself with UNC in the conduct of the litigation.

[9] The New Mexico Supreme Court plainly erred when it stated that UNC had not requested an injunction against arbitration and that the "first indication" that arbitration might be enjoined was a statement made by the trial judge in court on April 2, 1976 (p. 6a, *infra*). The court overlooked totally the proceedings of March 24, 1976, during which UNC's counsel explicitly asked that the order be expanded to cover arbitration (Transcript of proceedings, March 24, 1976, p.17). Its attorney also said at the time that he was concerned that UNC would be joined in "I don't know how many unknown places, in arbitration and other proceedings" (*Id.* at 18). Moreover, the New Mexico Supreme Court took GAC to task for its failure to "demand arbitration in the interim" between the trial judge's announcement of the terms of the preliminary injunction and the actual entry of the order—a period of four days (pp. 6a, 21a, *infra*). It hardly seems likely

Court to be unconstitutional. Dealing directly with the prospect of federal arbitration, the injunction said, in part (emphasis added):

> This injunction prohibits *the institution or prosecution of* ordinary litigation, third party proceedings, cross-claims, *arbitration proceedings* or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto.

4. *GAC Seeks Immediate Appellate Review.*

GAC proceeded immediately to obtain appellate review of the trial judge's preliminary injunction by seeking a writ of prohibition in the New Mexico Supreme Court. That court entertained GAC's application and heard oral argument. On June 16, 1976, however, the New Mexico Supreme Court denied the requested writ without opinion. GAC then petitioned to this Court for a writ of certiorari.

In the meantime, because it was under an outstanding court order prohibiting it from instituting or prosecuting "arbitration proceedings," GAC participated in the New Mexico litigation to protect its position if its challenge to the injunction were ultimately rejected. It included compulsory counterclaims in its answer, joined the utilities as additional defendants, engaged in discovery, and filed and responded to all appropriate motions.

that GAC's rights under the Federal Arbitration Act could be deemed "waived" because GAC failed to engage in the very questionable practice of serving an arbitration demand after it had been formally advised by the judge that an injunction would shortly be entered prohibiting precisely this conduct.

5. *GAC Continues To Invoke the Right To Arbitrate.*

UNC responded to GAC's petition in this Court by arguing that the New Mexico Supreme Court's refusal to issue a writ of prohibition had rested on adequate and independent state grounds. This Court thereupon vacated the judgment and remanded the case to the New Mexico Supreme Court for a clarification as to "whether judgment is based upon federal or state grounds, or both." *General Atomic Co.* v. *Felter*, 429 U.S. 973. The New Mexico Supreme Court filed an opinion almost three months thereafter, indicating, contrary to UNC's assertion, that it had decided the case on federal grounds, but ruling again adversely to GAC. 90 N.M. 120, 560 P.2d 541 (1977).[10] GAC's May 1977 petition to this Court to review that judgment complained specifically, in four pages of argument, about the effect of the trial judge's injunction on GAC's "federal rights to arbitration of disputes." Petition for a Writ of Certiorari, *General Atomic Co.* v. *Felter*, No. 76-1640, pp. 20-24.

On October 31, 1977, this Court ruled summarily that the preliminary injunction was unconstitutional. *General Atomic Co.* v. *Felter*, 434 U.S. 12. With ref-

[10] The unanimous opinion was written by the late Justice McManus, who did not participate in subsequent phases of this case. The concurring judges were Justices Sosa, Easley and Payne, who comprised the three-judge panel which issued the decision which is the subject of this petition.

erence to arbitration, this Court said that GAC had "every right to attempt ... under ... the Federal Arbitration Act" to defend itself by bringing UNC into "federal arbitration proceedings." 434 U.S. at 18.

6. *The Trial Judge Delays Effectuation of This Court's Ruling.*

Coincidentally, the trial judge had scheduled the trial on the merits to begin on October 31, 1977, and he adhered to his schedule, refusing to pause even after being advised of this Court's decision of that date.[11] When GAC requested orally on November 3 and 7 that the Santa Fe judge vacate the preliminary injunction immediately so that arbitration could be pursued, UNC's counsel (who had been a Justice of the New Mexico Supreme Court until June 1976)[12]

[11] In the course of colloquy on the decision, the trial judge advised counsel that while he would "comply with any mandate from the New Mexico Supreme Court or the United States Supreme Court" because "[t]he law requires that," it was his view that "[t]he law does not require that we agree with the appellate decisions." The judge advised counsel, "I happen to agree with the opinion of Justice Rehnquist" (who had dissented). Transcript of November 7, 1977, p. 5/46.

[12] Details regarding the chronology of the resignation of UNC's counsel from the New Mexico Supreme Court and contemporaneous news reports regarding his participation in this litigation were provided in GAC's first petition for a writ of certiorari. Petition for Writ of Certiorari, *General Atomic Co.* v. *Felter,* No. 76-385, pp. 9-10, n.**. See also Brief in Opp., p. 10, n.7. GAC also moved in the course of the litigation in the New Mexico courts to disqualify the law firm representing UNC on the ground of conflict-of-interest because that firm had represented Gulf in the development of a uranium mine in New Mexico which played a part in UNC's allegations in this case. The disqualification motion was denied by the trial judge, and that denial is one of the issues now pending on appeal in the New Mexico Supreme Court. On the very same facts relating to the firm's conflict of

insisted that no action should be taken until the New Mexico Supreme Court formally sent its mandate to the trial court. Despite the fact that this Court had held that the injunction was illegal, he insisted to the trial judge, on UNC's behalf, "We feel that we need the protection of that injunction more than ever." Transcript of Proceedings, Nov. 7, 1977, p. 5/35. The trial judge then denied GAC's request, left the injunction in effect, and proceeded with the trial, which was only in its fifth day.

7. *GAC Serves Its Arbitration Demand.*

Almost a full month after the Santa Fe judge persisted in continuing the trial and 20 months after the entry of the illegal injunction, GAC was finally given an opportunity to demand federal arbitration. Judge Felter received the formal mandate of the New Mexico Supreme Court on November 28, 1977, and then "modified" his preliminary injunction by "excluding from its terms and conditions all *in personam* actions in federal courts and all other matters mandated to be excluded from the operation of the preliminary injunction by the opinion of the Supreme Court, dated October 31, 1977." On the following day, November 29, 1977, GAC filed with the American Arbitration Association in San Diego, California, a demand for arbitration with UNC of issues growing out of the 1973 Supply Agreement.[13] It also made arbitration

interest, the Seventh Circuit held that the firm was disqualified from representing UNC in related litigation pending in federal court in Chicago. *Westinghouse Electric Corp.* v. *Gulf Oil Corp.,* 588 F.2d 221 (1978).

[13] The New Mexico Supreme Court initially stated in the fourth paragraph of its opinion: "The trial had been in progress almost sixty days when the U.S. Supreme Court mandate came down."

claims against UNC in connection with two pending arbitrations under the utility agreements which had been assigned by UNC. One day later, GAC moved that the Santa Fe trial be stayed pending completion of these federal arbitrations. UNC responded with a cross-motion, accompanied by proposed findings and a proposed partial final judgment, requesting a stay of all three arbitrations. UNC relied in these papers exclusively on the New Mexico Arbitration Act, N.M.S.A. §22-3-9, *et seq.*

8. *The Trial Judge Again Unlawfully Bars Arbitration.*

On December 16, 1977, Judge Felter denied GAC's requested relief and granted UNC's. His written decision was a verbatim reproduction of the proposed findings and conclusions which UNC had submitted, and he accepted totally UNC's proposed partial final judgment. Although he refused an evidentiary hearing, he concluded, as requested by UNC, that GAC had "waived" and was "in default" of its federal ar-

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This was subsequently corrected, *sua sponte*, to read "The trial had been in progress several days when the U.S. Supreme Court mandate came down . . ." (p. 2a, *infra*). The New Mexico Supreme Court did not, however, correct the statement later in its opinion that "[t]he district court had jurisdiction over the arbitration controversy under the Federal Arbitration Act, at least up to approximately sixty days into the trial of the case on the merits, when GAC made demand for arbitration and moved for a stay in the proceedings" (p. 33a, *infra*). Nor did it correct the equally erroneous statement that "GAC did not properly manifest its intention or desire to arbitrate . . . to a point well into the trial of the second case" (p. 26a, *infra*). As previously noted, GAC asked twice, during the first week of trial and before any substantive witnesses had been called, that the injunction be vacated immediately so that arbitration could proceed.

bitration rights. The basis for this conclusion was that "[a]t no point between the commencement of the first action . . . and the filing of the pending Motion for Stay (a period of more than two years), did GAC file a demand for arbitration, petition any court for an order compelling arbitration, petition this court for a stay of proceedings pending arbitration, or in any way manifest its intention or desire to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement."[14] Based on this finding of waiver, Judge Felter stayed the prosecution by GAC of claims against UNC relating to the two utility arbitrations, as well as the San Diego arbitration. This judgment was later to be disapproved by this Court and described as "inconceivable" in the Court's decision of May 30, 1978, on GAC's Motion for Leave to File Petition for Writ of Mandamus. 436 U.S. 493, 497.

Having stayed the arbitrations initiated by GAC, the Santa Fe court naturally declined to stay its own trial in favor of these arbitrations. The judge entered a minute order to this effect on December 16, 1977. To facilitate appellate review, GAC requested that this order be rendered in the form of an appealable "partial final judgment." UNC responded by again submitting a decision and form of judgment for the

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[14] Substantially the same findings and conclusions were entered when the Santa Fe court entered its partial final judgment refusing to stay its trial (the subject of this petition) on December 27, 1977. See pp. 50a, 46a, *infra*. Indeed, the only significant difference between the December 16 and 27 decisions was that the judge, at UNC's suggestion, stated in his December 27 decision that he may have jurisdiction under the Federal Arbitration Act. In his earlier ruling, he had adopted UNC's legal conclusion—contested by GAC—that only state law applied. See p. 50a, *infra*.

court's signature, and the trial court again entered UNC's proposals. The decision entered on December 27, 1977, which is the subject of this petition, was substantially identical to the decision of December 16.

9. *The Trial Concludes Suddenly With a Default Judgment.*

GAC then appealed to the New Mexico Supreme Court from Judge Felter's orders of December 16 and 27, and also sought prompt remedial action in this Court to permit the arbitration proceedings initiated by GAC to continue. While GAC's pleadings to be filed in this Court were in their final stages, Judge Felter precipitously terminated the trial on March 2, 1978 (before UNC had even completed presentation of its case) and thereafter entered default judgments in favor of UNC and I & M.[15]

[15] The default was based upon GAC's failure to produce, allegedly in bad faith, information and documents belonging to a Canadian subsidiary of Gulf (not a party to the Santa Fe litigation) which related to a "cartel" of foreign governments and uranium producers. The documents were located in Canada, and their production, or disclosure of information derived from them, would have subjected those responsible to severe criminal sanctions under Canadian law. Appeals from these judgments have been briefed and argued before the New Mexico Supreme Court and are now awaiting decision. Petitions for certiorari seeking immediate relief, prior to review by the New Mexico Supreme Court, with regard to the order directing disclosure of the foreign documents and with regard to the default were filed with this Court in March 1978 and were denied. *General Atomic Co.* v. *Felter*, Nos. 77-1236 and 77-1269, *certiorari denied*, 436 U.S. 904 (1978). GAC has contended in the New Mexico Supreme Court that the default judgments and the orders leading up to them are unprecedented interferences with foreign relations with a friendly neighbor and present serious constitutional issues under the Due Process Clause and the constitutional doctrines relating

10. *This Court Grants Extraordinary Relief.*

On May 30, 1978, this Court granted GAC's Motion for Leave to File Petition for Writ of Mandamus, holding that Judge Felter's order staying the arbitrations was in violation of this Court's prior mandate.[16] This Court's opinion reaffirmed GAC's right to present its arbitration claims in federal forums, including the San Diego arbitration and other arbitration proceedings that had been stayed illegally by the Santa Fe court (436 U.S. at 496; footnote omitted):

> In its order of December 16, 1977, the Santa Fe court has again done precisely what we held that it lacked the power to do: interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration.

This Court went on to say (436 U.S. at 497):

> [W]e have held that the Santa Fe court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration or for any other

to the allocation of functions between the national government and the states and between the Executive and Judicial branches. They have been the subject of a series of Diplomatic Notes served on the United States by the Government of Canada, and an *amicus curiae* brief filed in this Court.

[16] The pleadings of both parties had addressed the December 16 and December 27 decisions, which contained virtually identical findings and conclusions, on the assumption that they would stand or fall together. But this Court did not disturb the December 27 order—the refusal to stay the Santa Fe trial—on the ground that this second order did not, in and of itself, restrict GAC from "pursuing its arbitration claims in other forums." 436 U.S. at 498, n.2. Since the only issue before the Court on GAC's mandamus petition was whether Judge Felter had disobeyed the earlier mandate, the Court apparently was prepared to review at that time only such orders as directly prohibited arbitration.

reason whatsoever. GAC, as we previously held, has an absolute right to present its claims to federal forums.

11. *Arbitration Begins After UNC's Action for an Injunction is Dismissed.*

After this Court's ruling, the American Arbitration Association ("AAA") indicated that it would proceed with the arbitration demanded by GAC. UNC first threatened the AAA and then instituted a lawsuit against it in the New Mexico federal district court to enjoin the arbitration. UNC contended that Judge Felter's conclusion that arbitration had been waived, as well as his default and declaratory judgments holding the Supply Agreements invalid, were entitled to *res judicata* effect and had to be accorded Full Faith and Credit. For that reason, UNC contended, the arbitration could not proceed. UNC's complaint was dismissed by the District Court on September 27, 1978. *United Nuclear Corp.* v. *American Arbitration Association*, No. 78-522. In its opinion, the district court stated that any claim of *res judicata* or Full Faith and Credit could be presented to, and decided by, the panel of arbitrators. Although UNC moved for reconsideration of that decision and, on denial, filed a notice of appeal, it subsequently dismissed the appeal voluntarily.

The panel of arbitrators convened in Chicago, Illinois, on December 13, 1978, and January 25–26, 1979. It solicited written submissions from the parties and convened again for four days of argument on "preliminary issues" in San Diego, California, on March 26–29, 1979. Although UNC had enumerated fourteen "preliminary issues" in its first submission to the

arbitrators, it later refused to brief or argue orally any issue other than whether the arbitrators were compelled by law to accord *res judicata* effect and grant Full Faith and Credit to the conclusion of Judge Felter that GAC had waived its right to arbitrate and to his declaratory judgment, based on the default, that the 1973 Supply Agreement was invalid. When the arbitration panel indicated that it intended to hear the scheduled argument on other issues, UNC walked out of the proceeding and instituted another lawsuit against GAC and the arbitrators in the United States District Court in San Diego to stop the arbitration. Again UNC contended, *inter alia*, that Judge Felter's findings were conclusive. Although no preliminary injunction was requested, the arbitration panel, out of respect for the district court, suspended its proceedings while the lawsuit was pending. The district court dismissed the complaint on July 3, 1979, for lack of federal-question jurisdiction, but considered seriously UNC's argument that the doctrine of Full Faith and Credit might apply to Judge Felter's waiver findings. *United Nuclear Corp.* v. *General Atomic Co.*, Civ. No. 79-329-E (S.D. Calif.). On July 16, 1979, UNC filed a motion to reopen the judgment and permit it to amend its complaint, and that motion is pending at the time this petition is filed.

12. *The New Mexico Supreme Court Rules That GAC Waived Arbitration.*

The decision of the New Mexico Supreme Court which is the subject of this petition affirmed Judge Felter's finding of waiver. In reviewing that question, which the court held was properly an issue for the trial judge and not for the arbitration panel, the court placed great emphasis on GAC's conduct *after* the

date on which the injunction had been issued. It said (p. 19a, *infra*):

> Thus, we examine not only the acts of GAC that occurred prior to the time the injunction was entered on April 2, 1976, but the conduct or inaction of GAC thereafter as bearing on the real designs of the company.

The court affirmed the finding that arbitration had been waived on the ground that GAC had not expressed "its intention or desire to arbitrate rather than litigate" in the period between the institution of the action and November 29, 1977.[17] It said (p. 27a, *infra*):

> This complex, multi-party, multi-issue litigation was within days of final solution at the trial level when the first *demand* was made for arbitration. This very simple act of stating, in writing: "We want to arbitrate", followed by a motion for a stay of litigation, would have challenged the jurisdiction of the court to proceed. Our search of the record reveals no instance where these words were either written or spoken until November of 1977.[18]

[17] Since it overlooked the oral requests GAC counsel had made in the first five days of trial (November 3 and 7, 1977) that the injunction be removed so that arbitration could proceed, the New Mexico Supreme Court repeatedly asserted that even after this Court's decision of October 31, 1977, GAC did not express its desire to arbitrate until November 29, 1977.

[18] The court was, of course, plainly in error in suggesting that the litigation "was within days of final solution" when the demand for arbitration was served (on the day following removal of the injunction). The trial continued for three months after November 29, 1977, and the plaintiff's case had not yet been concluded when Judge Felter precipitously terminated it. The court was also in error in stating that GAC had never said, "We want to arbitrate." As recounted previously (pp. 11-12, *supra*), the prohibition against arbitration was added to the injunction precisely because GAC announced its intention to join UNC to an ongoing arbitration.

The New Mexico court also found (p. 25a, *infra*):

> that the court and UNC were misled into believing that GAC intended to litigate the issues and that its intent to arbitrate was not as strong as it now contends.[19]

With regard to the prohibition of the preliminary injunction, the New Mexico Supreme Court brushed it aside (p. 22a, *infra*):

> There is nothing in the preliminary injunction that prohibited GAC from demanding arbitration at any time by serving a demand on UNC in New Mexico, without regard for the location at which the arbitration would take place.

Underlying the decision was the New Mexico Supreme Court's novel proposition of law—supported by no authority whatever—that arbitration under the Federal Arbitration Act could not proceed unless Judge Felter was willing to stay his trial (p. 33a, *infra*):

> There was nothing in the amended injunction which prohibited GAC from demanding arbitration in the case to be conducted in any location, so long as an application was made to the district court to stay the pending trial. The Federal Arbitration Act prevented GAC from proceeding

[19] In concluding that UNC had been "misled into believing" that GAC was not interested in arbitrating, the New Mexico Supreme Court ignored totally the pleadings filed in this Court, which made GAC's wish to arbitrate entirely clear. It also ignored the proceedings of March 24, 1976, which it apparently overlooked entirely (note 9, *supra*). In that hearing, GAC's efforts to secure arbitration were discussed and became the basis for the request that arbitration be enjoined. GAC also requested, on November 3 and 7, 1977, that the injunction against arbitration be immediately vacated.

with arbitration without an order from Judge Felter. 9 U.S.C. §3.[20]

Finally, the court held that issues of New Mexico antitrust law which had been raised by UNC were not arbitrable under the Federal Arbitration Act. It relied upon a number of decisions by federal courts of appeal which had held that *federal* antitrust claims are not arbitrable, and the New Mexico Supreme Court concluded that "federal and state antitrust laws protect the same interests of society. . . ." (p. 40a, *infra*). The court below then ruled that all other disputed issues were "intertwined" with nonarbitrable state antitrust questions, so that the entire dispute was not arbitrable.

REASONS FOR GRANTING THE WRIT

The judgment below perpetuates an injustice in this very important case by again interfering with, impeding,and frustrating GAC's access to federal arbitration—a right which GAC secured in this Court "after a lengthy process of litigation, involving several layers of courts" (436 U.S. at 497), and which thereafter had to be enforced by this Court through the extraordinary procedure of mandamus. Meaningful implementation of this Court's two rulings requires reversal of the decision of the New Mexico Supreme Court because that decision threatens to achieve indirectly the same restriction against arbitration which this Court invalidated when the courts below attempted to impose it directly.

[20] The obvious unsoundness of this proposition is discussed at p. 32, *infra*. It means that a state judge could effectively enjoin federal arbitration by simply refusing to stay his trial.

Review by this Court is warranted, however, not only because the result of the New Mexico litigation is unjust and undermines the letter and spirit of this Court's earlier rulings, but also because the New Mexico Supreme Court has arrived at its judgment by misapplying the Federal Arbitration Act in important respects. Even if this case had not already been the subject of two summary decisions of this Court, the federal legal questions presented by the decision of the New Mexico Supreme Court would be sufficiently significant to warrant review here. The conclusions of the New Mexico courts conflict with rulings of this Court and lower federal courts in the area of federal arbitration, and these federal issues deserve clarification and authoritative resolution by this Court.[21]

1. *The "waiver" finding nullifies and evades this Court's prior rulings in this case.*

The principal reason why certiorari should be granted and the judgment below reversed is that UNC and the New Mexico courts are now attempting to accom-

[21] The New Mexico Supreme Court's affirmance of the Santa Fe court's December 27, 1977, partial final judgment constitutes a decision, by New Mexico's highest court, that the controversy between UNC and GAC should be resolved in state court, rather than in a federal arbitration. That decision is subject to no further review in New Mexico's court system. Further, the subject of the decision—GAC's right to federal arbitration—is a separate and independent matter, anterior to the merits of the underlying controversy between UNC and GAC, and not enmeshed in the factual and legal issues comprising UNC's cause of action. The New Mexico Supreme Court's decision is, therefore, a "final judgment" for purposes of this Court's jurisdiction under 28 U.S.C. §1257. *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 557-58 (1963); *American Motorists Ins. Co.* v. *Starnes*, 425 U.S. 637, 642 n.3 (1976). *See Local No. 438, Construction and General Laborers' Union* v. *Curry*, 371 U.S. 542, 548-52 (1963).

plish the very same result—barring GAC's right to arbitrate—which this Court resoundingly condemned twice on earlier occasions. Rather than "enjoining" GAC's prospective arbitrations, as Judge Felter unlawfully did on April 2, 1976, or "staying" arbitrations initiated by GAC, as he attempted unlawfully to do on December 16, 1977, the trial judge has now endeavored to prevent GAC's arbitrations by declaring that GAC has "waived" that federal right. Since the asserted "waiver" was, in fact, GAC's compelled obedience to Judge Felter's injunction, the finding of "waiver" cannot stand without according validity to the unlawful injunction itself. If the decision below is not vacated, the injunction will have had the same practical force and effect as if it had been upheld by this Court. The New Mexico Supreme Court has said, in substance, that although it was unlawful for Judge Felter to enjoin GAC from instituting federal arbitration or to stay arbitrations which had been demanded, GAC's compliance with Judge Felter's injunction—*i.e.*, its failure to institute arbitration while the injunction prohibited it from doing so—forever bars GAC from invoking that remedy. It would thus be a Pyrrhic victory that GAC has twice earned in this Court.

(a) *GAC's compliance with the injunction.*—During the time GAC was enjoined, it had no choice but to forswear federal arbitration temporarily and defend, as vigorously as possible, the litigation in Santa Fe which UNC had instituted.

This Court's decisions in *Howat* v. *Kansas*, 258 U.S. 181 (1922), and *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967), required GAC to take the course it did. A party subject to an assertedly unlawful order

by a state court must comply with it while seeking its reversal in accordance with orderly state appellate procedures. As this Court held in *Howat* (258 U.S. at 189-90) and reaffirmed in *Walker* (388 U.S. at 314):

> An injunction duly issuing out of a court of general jurisdiction with equity powers, upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them, however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.[22]

Having been enjoined from instituting federal arbitration, GAC could serve no demand for such arbitration without violating Judge Felter's order. Its obedience to the order cannot constitute the voluntary and deliberate relinquishment of a known right which is the earmark of a true waiver. *E.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); *Marchetti* v. *United States*, 390 U.S. 39, 51-52 (1968); *Brady* v. *United States*, 397 U.S. 742, 748 (1970).

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[22] Similarly, in *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968), this Court observed that demonstrators who had complied with state court orders prohibiting proposed rallies while taking appeals had "pursued the course indicated by *Walker*." This Court explained that the "proper procedure" is "to seek judicial review of the injunction and not to disobey it, no matter how well-founded their doubts might be as to its validity."

(b) *The meaning of the injunction.*—The New Mexico Supreme Court sought to overcome the obvious flaw in Judge Felter's reasoning by denying that GAC had been enjoined from demanding arbitration (pp. 22a, 33a, *infra*). According to the New Mexico Supreme Court, GAC could have proceeded to arbitration by serving a demand on UNC in Santa Fe and applying to Judge Felter for a stay of the trial. This novel interpretation of the preliminary injunction is contrary to its plain language, which prohibited the "institution or prosecution of . . . arbitration proceedings . . . ." It is also contrary to the history which led to the restraint on arbitration, to the premise of this Court's decisions, and to the expressed understanding of the parties after the injunction was reversed by this Court.

(i) The origin of the restraint on arbitration refutes the contention that GAC could have demanded that UNC arbitrate under AAA rules in San Diego. GAC advised UNC in March 1976 that it intended to bring UNC into a pending arbitration between Duke Power Co. and GAC, and the injunction's restriction against arbitration was added to Judge Felter's order at UNC's request precisely to prohibit this and all other arbitration claims. There can be no doubt, therefore, that if GAC had demanded arbitration with UNC anywhere other than in Judge Felter's jurisdiction and under his "supervision" (see pp. 30-31, *infra*), such an action would have opened it to contempt sanctions.[23]

[23] Indeed, UNC moved immediately for punitive measures against GAC when, between May and July 1976, GAC merely notified UNC in a series of letters of the Duke arbitration and attempted to "vouch" UNC into the proceeding. The trial judge denied UNC's requested sanction, but only because the "mere giving of notice . . . and a request to undertake defense" did not go far enough to constitute the "institution or prosecution" of arbitration.

(ii) The novel interpretation of the New Mexico Supreme Court plainly conflicts with the premise on which this Court issued its decisions of October 31, 1977, and May 30, 1978. This Court said in its first decision that GAC had been prevented by the preliminary injunction from asserting rights in "federal arbitration proceedings." This Court also said that "[t]he injunction has also prevented GAC from asserting claims against UNC under the arbitration provision of the 1973 uranium supply agreement in the pending arbitration proceeding instituted against GAC and UNC by Commonwealth. . . ." 434 U.S. at 18, n.11. These statements squarely contradict the New Mexico Supreme Court's assumption that "nothing in the preliminary injunction . . . prohibited GAC from demanding arbitration at any time. . . ." (p. 22a, *infra*).

When the case had to come to this Court again on GAC's Motion for Leave to File Petition for Writ of Mandamus, this Court reiterated that the preliminary injunction prevented GAC from demanding federal arbitration. Although UNC argued, in response to GAC's petition, that GAC had been free to arbitrate by merely moving to stay the trial before Judge Felter,[24] this Court held that the stay of December 1977 had, like the preliminary injunction, "interfere[d] with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration." 436 U.S. at 496. Thus the premise now utilized by the New Mexico

[24] Brief for Respondent in Opposition, No. 77-1237, p. 22.

Supreme Court—*i.e.*, that the injunction did not interfere with demands for federal arbitration—was squarely rejected by this Court on the case's most recent appearance here.

(iii) Finally, UNC did not suggest at any time prior to November 29, 1977, that GAC was free to demand federal arbitration in San Diego. To the contrary, UNC had sharply contended that even a "vouching in" notice violated the injunction. See note 23, *supra*. And when GAC argued in its May 1977 petition for a writ of certiorari that its access to arbitration rights under the Federal Arbitration Act was totally foreclosed by the injunction, UNC did not respond that GAC could arbitrate in San Diego by merely serving a notice.[25] Nor did UNC or the trial court suggest that the institution of federal arbitration was permitted when, in early November 1977, GAC stated that it wished to proceed with arbitration and asked for immediate modification of the injunction to permit it to do so. Instead, UNC's counsel told the District Judge, "We need the protection of the injunction more than ever." See p. 15, *supra*. Thus, UNC's own understanding is very persuasive refutation of the New Mexico Supreme Court's singular interpretation of the injunction.

The fact that the injunction prohibited only the institution of arbitration "in any other forum" and that Judge Felter had told GAC counsel that arbitration would be permitted "subject to the supervision of this Court" only proves that the judge and the parties understood that arbitration in another forum (such as San Diego) or under the "supervision" of some other court was plainly prohibited. The rights granted by the Federal Arbitration Act are not, of course, limited to the "forum" where one party initiates state-court litigation. Nor is federal arbitration conducted "subject to the supervision" of a judge of a state court. These limitations on GAC's right to arbitrate demonstrate that its federal rights were clearly enjoined.

(c) *Evading this Court's decisions.*—The necessary effect of the decision of the New Mexico Supreme Court is to nullify GAC's constitutional and statutory protection vindicated by decisions of this Court. This Court has held, in no uncertain terms, that the efforts to prevent federal arbitration of the dispute between GAC and UNC were unlawful, and has even taken the extraordinary measure of granting leave to file a petition for writ of mandamus to override promptly the Santa Fe court's effort to impede federal arbitration by issuing a "stay" of those proceedings. The New Mexico courts' invocation of a "waiver" rationale (which was also the basis for the "stay" which this Court found illegal) is no more legitimate than were the earlier grounds of decision utilized by the lower courts to achieve the same end. If this Court's ruling of October 31, 1977, had been implemented according to its letter and spirit, the injunction would have been lifted expeditiously and petitioner would have been afforded a full opportunity to exercise the rights unlawfully denied for almost 19 months. Instead, the New Mexico courts, at UNC's instance, have given this Court's decisions only the most grudging literal

[25] Compare Petition for Writ of Certiorari, *General Atomic Co.* v. *Felter*, No. 76-1640, pp. 20–24, with Brief in Opposition to Petition for Writ of Certiorari, *General Atomic Co.* v. *Felter*, No. 76-1640, pp. 6–11. See also Petitioner's Reply in Support of Petition for Writ of Certiorari, *General Atomic Co.* v. *Felter*, No. 76-1640, pp. 6–9.

reading, and have now concluded that compliance with the injunction amounted to a waiver of the rights of arbitration.

Indeed, the erroneous legal conclusion of the New Mexico Supreme Court that GAC could not proceed to federal arbitration "without an order from Judge Felter" (p. 33a, *infra*) leads inevitably to the same unlawful result that this Court repudiated when it overturned Judge Felter's two earlier interferences with federal arbitration. If a stay order from a local judge is a necessary precondition under the Federal Arbitration Act, any local judge could effectively enjoin arbitration by refusing to stay his trial. Under this legal rule, the denial of a requested stay would be the equivalent of an injunction against federal arbitration—an order which, under this Court's decisions, would be patently unconstitutional.

This Court's observations, in the course of its decision of May 30, 1978, that its "prior opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate" and that its "prior decision [did not] prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums" (436 U.S. at 497) were not, of course, approvals or authorizations of any waiver findings or refusals to stay. The issue before this Court on GAC's Motion for Leave to File Petition for Writ of Mandamus was only whether Judge Felter had "refused or failed to comply with" this Court's rulings. Limiting its relief to the precise remedy appropriate for mandamus, this Court observed that the "prior opinion" or "prior decision" did not, in and of itself, foreclose waiver findings or

judgments regarding a stay of the trial. Those issues are, however, presented now, on the full record before the trial judge, and, for reasons stated herein, the decision entered by Judge Felter is plainly erroneous.

2. *The "waiver" finding conflicts substantively and procedurally with appellate decisions of federal courts under the Federal Arbitration Act.*

In addition to nullifying this Court's earlier rulings in this very same litigation, the decision of the New Mexico Supreme Court that GAC had waived its fedeal arbitration rights by not invoking them in the manner suggested by the opinion conflicts squarely with the line of federal decisions governing the standards for waiver of federal arbitration rights. Moreover, by entering the waiver finding after refusing to hold an evidentiary hearing, Judge Felter violated both the Federal Arbitration Act and the Due Process of Law guarantee of the Fourteenth Amendment.

(a) *The delay in demanding arbitration.*—The New Mexico courts concluded that GAC had waited too long before demanding arbitration. Recognizing that findings that a party has waived federal arbitration rights are disfavored (pp. 13a–14a, *infra*), the New Mexico Supreme Court still found that there had been a waiver notwithstanding GAC's repeated express reservations of the right to demand arbitration and the immediate assertion of that right once the unlawful injunction was removed. The uniform rule in the federal courts has been that the very earliest time that a defendant in a civil action need elect whether to proceed with litigation or demand arbitration is when he joins issue by filing an answer to the complaint.

E.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Lecopulos,* 553 F.2d 842, 845 (2d Cir. 1977); *Chatham Shipping Co.* v *Fertex Steamship Corp.,* 352 F.2d 291, 293 (2d Cir. 1965) (Friendly, J.); *Hilti, Inc.* v. *Oldach,* 392 F.2d 368, 371 (1st Cir. 1968). This implements the overriding federal policy favoring arbitration, under which waivers of the statutory right are not lightly inferred. *E.g., Sibley* v. *Tandy Corp.,* 543 F.2d 540, 542 (1976), rehearing denied, 547 F.2d 286 (5th Cir. 1977); *Gavlik Construction Co.* v. *H.F. Campbell Co.,* 526 F.2d 777, 783 (3rd Cir. 1975); *Hart* v. *Orion Ins. Co.,* 453 F.2d. 1358, 1360 (10th Cir. 1971); *Carcich* v. *Rederi A/B Nordie,* 389 F.2d 692, 696 (2d Cir. 1968).

GAC had been given until May 6, 1976, to answer the UNC complaint. Consequently, it had the right under established federal law to defer until that date its decision whether or not formally to invoke the arbitration clause of the 1973 Supply Agreement by serving a demand for arbitration upon UNC. More than a month before its answer was due, GAC was enjoined from demanding federal arbitration.[26] Consequently, it was never given the time allowed by the Federal Arbitration Act, as consistently interpreted by the federal courts, in which to make its statutory decision whether to arbitrate.

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[26] The New Mexico Supreme Court was wrong in claiming that UNC was prejudiced by GAC's failure to file an arbitration demand and that this supported a finding of waiver. The fact that UNC, like GAC, had spent millions of dollars preparing for trial was not attributable to any delay by GAC. UNC procured and vigorously defended the illegal order which caused the judicial proceedings and their heavy expenses to continue. A party may not complain of prejudice from an illegal order which *it procured.*

(b) *Participation in litigation.*—Nor did GAC's active participation in the Santa Fe litigation amount to a waiver of its right to arbitrate. What GAC did after it was enjoined from seeking relief in other forums constituted "purely necessary defensive action[s]" within the rule applied by this Court in the analogous context of *The Bremen* v. *Zapata Off-Shore Co.,* 407 U.S. 1, 20 (1972). The issue in the *Bremen* case was whether a contractual forum-selection clause vesting exclusive authority in a London court was enforceable. The party resisting the foreign forum contended that the institution of a limitation-of-liability lawsuit in the United States by its adversary amounted to a waiver of the foreign forum. This Court, noting the "dilemma" confronting a litigant faced by unavoidable delays in court processes and the uncertainties of litigation (407 U.S. at 5), said that the party instituting the local lawsuit "had no other prudent alternative but to protect itself by filing for limitation of its liability." 407 U.S. at 19. In this case as well, GAC's participation in the Santa Fe litigation during the pendency of the unconstitutional injunction constituted the only "prudent alternative" available to it. A waiver of arbitration under the Federal Arbitration Act cannot, for this reason, be based upon a party's protective stance in litigation which it challenges. In *General Guaranty Insurance Co.* v. *New Orleans General Agency,* 427 F.2d 924, 929 (5th Cir. 1970), a federal court of appeals held that there had been no waiver of arbitration by a party to litigation who participated fully in judicial proceedings while his claim to arbitration was *sub judice:*

> [I]t loses sight of the purposes and effects of arbitration . . . to treat the court proceedings as a sort of judicial tightrope which the party seeking arbitration walks at his peril.

(c) *Refusal of an evidentiary hearing.*—For the reasons previously stated, the finding that GAC had "waived" its right to arbitrate was, on the undisputed facts, demonstrably improper and erroneous, and should be reversed. Even if, however, an inquiry into GAC's "real designs" or "state of mind" was necessary (as the New Mexico Supreme Court believed, p. 19a, *infra*), a determination on such an issue could not constitutionally and lawfully be made without a full evidentiary hearing. The Second and the Ninth Circuits have held that critical factual determinations on contested allegations in cases arising under the Federal Arbitration Act may be made only after an evidentiary hearing. *A/S Custodia* v. *Lesin International, Inc.*, 503 F.2d 318 (2d Cir. 1974); *El Hoss Engineering & Transport Co.* v. *American Independent Oil Co.*, 289 F.2d 346 (2d Cir. 1961). These rulings effectuate the general constitutional principles of the Due Process Clause, as applied by this Court in cases such as *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Bell* v. *Burson*, 402 U.S. 535 (1971); and *Goss* v. *Lopez*, 419 U.S. 565 (1975). The decision of the New Mexico courts violated these principles.

3. *The New Mexico courts should have implemented this Court's decision by restoring the status quo ante.*

The decision of the New Mexico Supreme Court also conflicts with the constitutionally required remedy that the lower courts should have utilized to carry out this Court's decision invalidating Judge Felter's preliminary injunction. That injunction improperly barred a party to ongoing litigation (GAC) from federal forums which were constitutionally guaranteed. The opposing party (UNC) should not have been permitted to benefit in any way from the unlawful order which it had secured, and both parties should have been restored, immediately upon invalidation of the injunction, to the *status quo ante.*

As long ago as 1842, this Court held in *Gordon* v. *Longest*, 41 U.S. (16 Pet.) 97, 104 (1842), that when a state court has impermissibly refused to allow removal of a case within the jurisdiction of the federal court:

> every step subsequently taken, in the exercise of a jurisdiction in the case, whether in the same court or in the court of appeals, was coram non judice.

This Court held that the proper remedy in such a situation is to put the parties back to the status quo existing at the time that the state court unlawfully frustrated resort to the federal remedy. This rule has been followed by this Court in several other removal cases. *See Tennessee* v. *Union & Planters' Bank*, 152 U.S. 454, 464 (1894); *American Fire and Casualty Co.* v. *Finn*, 341 U.S. 6, 17–19 (1951); cf. *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963). It has been applied by the Court of Appeals for the Fifth Circuit in the arbitration context. *Sibley* v. *Tandy Corp.*, 543 F.2d 540 (1976), rehearing denied, 547 F.2d 286 (5th Cir. 1977).

In *Sibley*, a trial court held that the presence of nonarbitrable federal securities act issues in a dispute precluded arbitration of the dispute altogether. It then proceeded to trial on both arbitrable and nonarbitrable issues. After finding that the trial court had erred in not staying its trial in favor of arbitration, the Fifth Circuit reversed the judgment as to all issues, even those which could not, in any event, be referred to arbitration. The losing party sought a re-

hearing, and the panel then emphasized that the party which had erroneously urged that the dispute be resolved in court proceedings was not entitled to retain the benefits of that error (547 F.2d at 287):

> Parker, however, successfully urged upon the court its primary position that everything must be settled in court and that nothing could be arbitrated. It not only prevented arbitration's being first in time but also secured a declaration that foreclosed the possibility of arbitration's and trial's proceeding simultaneously. Having persuaded the court to choose a course 180 degrees off the correct one, Parker has little force to his argument that he should be permitted to enjoy the substantial benefits of a trial that should not have been held.

In this case, a necessary consequence of this Court's reversal of the unconstitutional preliminary injunction should have been the invalidation of all proceedings that were made possible by the injunction. Such relief would have vitiated the orders entered by Judge Felter, and particularly his extraordinary discovery and default decrees.

4. *The ruling that courts, and not arbitrators, decide whether arbitration has been waived conflicts with decisions of this Court.*

The New Mexico Supreme Court also misallocated the functions of courts and arbitration panels when it ruled that Judge Felter was authorized to decide whether GAC had waited too long in filing its arbitration demand. This Court's decisions have construed federal law as assigning to arbitration panels all factual issues relating to a party's alleged delay in demanding arbitration. Judge Felter's determination,

approved by the New Mexico Supreme Court, to render a judicial decision as to whether GAC "waived" its right to arbitration conflicts with this Court's decisions which relieve the judiciary of that burden and shift the determination to the arbitration tribunals voluntarily selected by the parties.

In *International Union of Operating Engineers* v. *Flair Builders, Inc.*, 406 U.S. 487 (1972), a party to an arbitration clause sought to dismiss a suit to compel arbitration on the ground that the plaintiff's "delay in seeking arbitration constituted laches barring enforcement of the contract." The trial court held that a delay of several years in demanding arbitration precluded access to that remedy, and the court of appeals affirmed, concluding that a claim of "dilatory notification of the existence" of an arbitrable dispute was an issue to be decided by the court. This Court reversed the lower court rulings and explained that (406 U.S. at 491–92):

> [O]nce a court finds that, as here, the parties are subject to an agreement to arbitrate, and that agreement extends to "any difference" between them, then a claim that particular grievances are barred by laches is an arbitrable question under the agreement. . . . Having agreed to the broad clause, the company is obliged to submit its laches defense, even if "extrinsic," to the arbitral process.

This Court has repudiated traditional judicial resistance to arbitration and ruled that arbitrators are empowered under federal law to decide preliminary procedural questions "which grow out of the dispute and bear on its final disposition," *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 557 (1964), as well as other issues extrinsic to the provisions of a con-

tract with an arbitration clause, *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (fraud in the inducement). By contrast, the role of courts under the Federal Arbitration Act is strictly limited. In ruling on a motion for a stay of court proceedings, courts may consider "only issues relating to the making and performance of the agreement to arbitrate." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co., supra*, 388 U.S. at 404.

Federal courts of appeal have divided over the question whether a court may consider and decide a claim that a party has waived arbitration by delaying its demand, or whether such an issue must be left to the arbitrators.[27] The Second Circuit has taken the position that issues of waiver are for the arbitration panel. *World Brilliance Corp.* v. *Bethlehem Steel Co.*, 342 F.2d 362, 364 (2d Cir. 1965). Other courts have read this Court's *Flair Builders* decision narrowly, denying that it applies when waiver turns on a party's participation in litigation. *Reid Burton Construction, Inc.* v. *Carpenters District Council*, 535 F.2d 598, 602-603 (10th Cir. 1976); *N & D Fashions, Inc.* v. *DHJ Industries, Inc.*, 548 F.2d 722, 728 (8th Cir. 1977). As a result, there has been considerable uncertainty as to the proper allocation, between courts and federal arbitrators, of defenses such as "laches," "default," "waiver," or "estoppel." A decision giving arbitrators broad authority to resolve such defenses would accord with this Court's prior decisions, would give due recognition to the federal policy favoring arbitration, and would avoid fragmentation of disputes between al-

[27] The New Mexico Supreme Court recognized the existence of this conflict (p. 11a, *infra*).

ready over-burdened courts and the arbitration forums selected by the parties.[28]

5. *Barring arbitration because state antitrust issues were asserted by UNC conflicts with the Federal Arbitration Act.*

The New Mexico Supreme Court's alternative ground of decision was the asserted nonarbitrability of state antitrust issues. This ground raises two vital questions of federal law. One question is whether state antitrust claims are nonarbitrable even though the Federal Arbitration Act broadly upholds arbitration rights set forth in contracts involving interstate commerce and makes no exception for state antitrust issues arising under such contracts. The other question is whether, assuming that state antitrust issues *are* nonarbitrable, the arbitrability of ordinary contract questions which may moot the state antitrust issues is also precluded.

[28] The last proviso in Section 3 of the Federal Arbitration Act, 9 U.S.C. §3, which authorizes a federal court to which a stay application is made to grant a stay only if "the applicant for the stay is not in default in proceeding with such arbitration," was not intended to give courts the power to decide whether arbitration was waived. Section 4, which must be read *in pari materia* with Section 3, does not give a court enforcing an arbitration clause any such power. Section 4 uses the word "default" five times as a term of art—*i.e.*, with reference to a party who refuses totally to comply with an arbitration clause. The concluding proviso of Section 3 was, in this light, designed to prevent a party who refuses to proceed with arbitration—*i.e.*, who is "in default" in the same sense as used in Section 4—from halting litigation on a mere showing that the dispute is subject to arbitration. This was the construction approved by Judge Learned Hand in *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978, 989 (2d Cir. 1942). See also *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U.S. 449, 453-54 (1935) (approving Judge Hand's discussion of this issue, 70 F.2d at 299).

(a) *Arbitrability of state antitrust questions.*—Section 2 of the Federal Arbitration Act declares in broad terms that an arbitration clause in a contract involving interstate commerce is fully enforceable. The New Mexico Supreme Court, however, ruled that there can be no arbitration of state antitrust issues arising under such a contract. It predicated its ruling on cases which have denied arbitrability to *federal* antitrust and securities issues.[29] It is, however, one thing to reconcile conflicting federal statutes by exempting federal antitrust issues from the federal arbitration statute; it is quite another to reconcile conflicting federal and state statutory policies by giving the state policy precedence. The New Mexico Supreme Court has, in effect, held the Federal Arbitration Act to be preempted by the New Mexico Antitrust Act. That raises a constitutional problem under the Supremacy Clause.

Federal courts have uniformly recognized the supremacy of the Federal Arbitration Act when it has conflicted with substantive state policies. For instance, in *Romnes* v. *Bache & Co.*, 439 F.Supp. 833, 839 (W.D. Wis. 1977), which concerned the arbitrability of state securities law claims, the district court held:

> [T]he Federal Arbitration Act creates federal substantive law, and a federal court is not bound to follow state law in interpreting matters arising out of contracts involving interstate commerce, which contracts contain an arbitration clause, nor is it bound to heed state public policy which does not accord with federal policy in this matter.

[29] *E.g., Wilko* v. *Swan*, 346 U.S. 427 (1953); *Cobb* v. *Lewis*, 488 F.2d 41 (5th Cir. 1974); *American Safety Equipment Corp.* v. *J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

See also, to the same effect, *Collins Radio Co.* v. *Ex-Cell-O Corp.*, 467 F.2d 995, 998 (8th Cir. 1972); *Stokes* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 523 F.2d 433, 437 (6th Cir. 1975); *Grand Bahama Petroleum Co.* v. *Asiatic Petroleum Corp.*, 550 F.2d 1320, 1326 (2d Cir. 1977).

This Court has itself previously rejected the proposition that state and federal antitrust policies are entitled to like treatment when both must be reconciled with another federal statute. In *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 635–36 (1975), which concerned the question whether an agreement between a union and an employer was subject to federal and state antitrust statutes, this Court said:

> Although we hold that the union's agreement with Connell is subject to the federal antitrust laws, it does not follow that state antitrust law may apply as well. . . . The use of state antitrust law to regulate union activities in aid of organization must also be preempted because it creates a substantial risk of conflict with policies central to federal labor law.

The arbitrability under the Federal Arbitration Act of claims made under state antitrust laws is an important issue that requires resolution by this Court.

(b) *"Intertwinement" of state antitrust issues*—Even if it be assumed, *arguendo,* that state antitrust issues are not arbitrable, it would violate the strong federal policy favoring arbitration to bar arbitration on the basis of a mere assertion of "intertwinement." Application of the "intertwinement" doctrine requires a practical judgment as to whether arbitration of arbitrable issues or litigation of nonarbitrable issues

should proceed first—or whether arbitration and litigation should go forward together. This judgment turns on factors such as the severability of the arbitrable and nonarbitrable claims, the possibility that arbitration of contract issues may totally dispose of nonarbitrable issues, *Sibley* v. *Tandy Corp.*, 543 F.2d 540 (1976), rehearing denied, 547 F.2d 286 (5th Cir. 1977), and the substantiality of the federal antitrust defenses being asserted, *N.V. Maatschappij Voor Industriele Waarden* v. *A. O. Smith Corp.*, 532 F.2d 874, 877 (2d. Cir. 1976). The state courts of New Mexico declined to engage in this practical analysis, choosing instead to rest solely on an abstract and generalized analysis of "intertwinement." They thus ignored the fact that this is, at bottom, a straightforward contract dispute. UNC's antitrust contentions are only some of the issues that have been raised, and others, which are plainly arbitrable, may be dispositive of the dispute.

Those issues may and should be determined by arbitrators before any consideration is given to whether there is merit to UNC's claim under the New Mexico antitrust laws. The federal courts have squarely rejected the proposition "that arbitrable claims become subject to adjudication in court merely because they are related to non-arbitrable claims." *Lee* v. *Ply*Gem Industries, Inc.*, 593 F.2d 1266, 1275 (D.C. Cir. 1979). The decision of the lower courts to the contrary undermines the policy of the Federal Arbitration Act and permits state law to govern in place of the federal statute which the Constitution declares to be supreme.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the judgment of the Supreme Court of New Mexico reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 11,775

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

v.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,
Defendant-Appellant,

INDIANA AND MICHIGAN ELECTRIC COMPANY
Defendant-Appellee.

Appeal From the District Court of Santa Fe County

EDWIN L. FELTER, *District Judge*

OPINION

EASLEY, *Justice.*

Appellee-plaintiff, United Nuclear Corporation (UNC), filed this declaratory judgment action in the Santa Fe County District Court against appellant-defendant, General Atomic Company (GAC), alleging fraud, unlawful monopolistic practices and violation of the antitrust laws, and seeking cancellation of two uranium supply contracts and

damages. GAC denied those allegations, claimed the principal issues are subject to arbitration under the terms of the contract, and counterclaimed against UNC for over one billion dollars in damages.

Indiana and Michigan Electric Company (I & M) and Detroit Edison Company (Detroit), (collectively "the utilities"), were brought into the suit as third-party defendants because they were to be supplied uranium products by GAC from the supplies that UNC had contracted to deliver.

The district court enjoined GAC from proceeding to litigate or arbitrate the same issues in any other jurisdiction. GAC appealed to the U.S. Supreme Court, and that Court reversed.

The trial had been in progress several days when the U.S. Supreme Court mandate came down, but GAC moved to stay the trial until arbitration of the issues could be accomplished. The trial judge denied the motion on the grounds that GAC had waived its right to arbitration. GAC appeals this partial final judgment. We affirm.

The principal issues are:

(1) Whether the Federal Arbitration Act applies.

(2) Whether the issue of waiver of arbitration is for the court or for the arbitrators.

(3) If the determination is to be made by the court, whether the evidence here supports the trial court's finding of waiver.

(4) Whether under the circumstances GAC was constitutionally entitled to further hearing before the district court on the issue of waiver.

Other claims advanced by GAC are that: (5) the trial court's actions were inconsistent with the decision of the U.S. Supreme Court in this case; (6) the holding that the

state's antitrust claims are not arbitrable was in error; (7) the trial court should have stayed or severed the Duke and Commonwealth demands; and, (8) UNC obtained incorrect findings on issues not addressed below.

Factual Background

As we survey the massive accumulation of evidence, which could be measured by the ton, the key inquiry is: What was the intent of GAC? Did it intend to arbitrate, litigate or both? In order to determine this intent, we consider all the material assertions and objective manifestations of GAC, together with all other facts and circumstances. This calls for greater detail in setting forth the facts.

UNC and GAC were parties to two contracts, one dated June 30, 1973 (1973 Supply Agreement) covering approximately twenty-five million pounds of uranium, and one dated June 28, 1974 covering three million pounds of uranium (1974 Concentrates Agreement), under which UNC was to supply uranium to GAC. The 1973 Supply Agreement contained an arbitration clause calling for arbitration of all disputes under the rules of the American Arbitration Association (AAA). These rules provide a simple method of invoking arbitration. The initiating party makes demand, setting forth the nature of the dispute, the amount involved and the remedy sought. This is served on the other party and filed in any regional office of AAA, accompanied by a proper fee. (When GAC ultimately filed its motion for stay, it consisted of two pages, and the demand for arbitration contained three and one-half pages.)

GAC is a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc. On August 8, 1975 UNC first filed suit in the Santa Fe District Court against GAC as well as the individual partners in GAC, Gulf and Scallop, asking for a declaratory judgment and damages and raising all issues arising under the 1973 Supply Agreement.

The cause was removed by the defendants to the U.S. District Court for the District of New Mexico. Gulf and Scallop moved to extend the time to answer the complaint and to object to interrogatories propounded by UNC. As grounds for the motion, movants alleged that more time was necessary to determine whether to seek arbitration.

On October 6, 1975 Gulf filed a motion for additional time, stating that failure to demand arbitration prior to answering the complaint without asserting its right to arbitration might constitute a waiver of Gulf's right to compel arbitration. UNC sought voluntary dismissal of the cause in federal court, *which the defendants opposed;* but, the case was dismissed on December 31, 1975, five months after being filed. Neither GAC, Gulf nor Scallop had demanded arbitration or requested a stay in the proceedings to arbitrate.

On December 31, 1975, the same day the first suit was dismissed, UNC again filed suit, against GAC only, in the District Court of Santa Fe County alleging virtually identical claims and filing identical interrogatories. GAC then filed an affidavit of disqualification against Judge Santiago Campos.

On January 19, 1976 GAC filed a federal interpleader action in the U.S. District Court for the District of New Mexico against UNC, I & M, and Detroit as well as Duke Power Company and Commonwealth Edison Company. Although stating that it was not waiving its right to arbitration, GAC sought the judicial determination of all the rights and obligations of the parties under the 1973 Supply Agreement and other utility agreements. On March 2, 1976 the case was dismissed for lack of subject matter jurisdiction. GAC appealed the dismissal to the Tenth Circuit where it was affirmed in April of 1977. *General Atomic Co.* v. *Duke Power Co.,* 553 F.2d 53 (10th Cir. 1977).

In February and March 1976 GAC filed motions to dismiss for lack of personal jurisdiction, for additional time

to answer interrogatories, and for dismissal due to the failure to join certain parties. All three motions specified that they were made "without waiving its right to demand arbitration."

In a brief in support of its application to dismiss for lack of jurisdiction, filed on March 22, 1976, the following statement was contained: "At the outset, defendant admits to having filed various legal actions in New Mexico because New Mexico provided the only or best forum for the vindication of its rights in various matters."

In March 1976 UNC moved for a default judgment for a willful failure to answer interrogatories, but later withdrew the application "in consideration of the agreement attached hereto." The agreement specified that GAC was to answer "in good faith all interrogatories to defendant presently pending." The parties stipulated to a number of actions to be taken in the discovery process which would not have been available as a matter of right under arbitration, and which ultimately cost the parties millions of dollars. Nothing was mentioned in the stipulation regarding GAC's asserted right to arbitrate.

On March 15, 1976 UNC applied for an injunction to restrain GAC from *filing suit* against UNC in other jurisdictions concerning the same facts and circumstances. No mention was made of arbitration. On that same date a temporary restraining order was issued for a ten-day period prior to the hearing enjoining GAC from filing suits or third-party complaints against UNC in any other jurisdiction. The restraining order placed no restraints on GAC against demanding arbitration and seeking a stay of the court proceedings during this period of time, which was seven months after the first complaint had been filed. Up to that time, GAC had made no demand for arbitration upon which a challenge to the jurisdiction of the court could be predicated. GAC filed a response and memorandum brief in answer to the motion for a preliminary in-

junction but did not mention the issue of arbitration therein.

The first indication in the record of proceedings that arbitration might be enjoined is a statement by the court at the hearing held on April 2, 1976 on the application for enjoining lawsuits in other forums. The judge referred to a letter written by him, dated March 29, 1976, three days before the hearing, in which he had outlined the terms of the proposed preliminary injunction. One of the terms was to restrain GAC from seeking *arbitration* in any other forum, a remedy not even requested by UNC. The letter was received by GAC attorneys on March 30, 1976. No effort was indicated on the part of GAC to preclude a hearing on restraints against arbitration because of lack of proper notice, and no effort to demand arbitration before the hearing. The preliminary injunction followed closely the statement of terms contained in the letter.

As bearing on GAC's avowed allegiance to arbitration of the issues here, there was a significant colloquy among the attorneys and the judge at the hearing on the motion for preliminary injunction held three days after GAC received the judge's letter. The letter and the form of the preliminary injunction were under discussion. GAC made reference to the clause in the contract providing for arbitration and called specific attention to the New Mexico Uniform Arbitration Act, § 44-7-2(D), N.M.S.A. 1978, which reads as follows:

> Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section . . . .

During those proceedings nothing was mentioned by GAC regarding federal arbitration rights.

GAC's attorney stated further: "We want to make sure and we have admitted language to this effect, that we are

not foreclosed, because obviously the Plaintiff would not be foreclosed from demanding arbitration *in this action.*" (Emphasis added.) GAC further complained that it was unequal treatment to enjoin GAC from participation in arbitration in other actions and not to restrain UNC from doing so. GAC asked that it not be deprived of the right to demand arbitration and suggested that it would be inappropriate to foreclose such remedy.

UNC stipulated that it should be equally enjoined by the preliminary injunction and the court interlined wording in the order to effect this purpose. The following discussion then took place.

MR. THOMPSON:	. . . [W]e believe that we should not be foreclosed, in spite of what the Plaintiff has stated at this point. I have also raised the question of the *possibility* of the Defendants desiring to exercise their rights to arbitration *in this case*, under Article 17 of the Contract, . . . (Emphasis added.)
THE COURT:	Subject to the supervision of this court.
MR. THOMPSON:	*That is correct.* We would ask that the Injunction be clear in excluding any prohibition against us demanding arbitration *in this case.* (Emphasis added.)
MR. BIGBEE:	It is clear enough anyway, anything they want to file into this action will be subject to your Honor's decision.

THE COURT: Did you, Mr. Bigbee, in your application for a Preliminary Injunction contemplate that the Defendants be enjoined from arbitrating under the Arbitration Clause of the Contract in this forum subject to the jurisdiction of this Court?

MR. BIGBEE: I did not. I understood that it may or may not come up. I have asked repeatedly if they want arbitration, they have never answered me; I think they waived it. That is not the point that I wanted an Injunction on. Anything they want to submit under their responsive pleadings, under the rules, they are entitled to do it.

The court, at another point when the language of the preliminary injunction was being discussed, stated:

THE COURT: I don't think there is anything in the language here that relates to arbitration in this forum pursuant to the arbitration clause contained in the contract. If there is any question about it that can be clarified.

MR. BIGBEE: There is no question that they have the right to include that, whether it should be granted or what[,] it is, [sic] under Your Honor's jurisdiction. . . .

The preliminary injunction, as issued, restrained GAC from either arbitrating or litigating the same issues "in any other forum." The dispute was brought to this Court, where the trial court was sustained, and then was taken to the United States Supreme Court, which held that the trial court could not properly restrain GAC from seeking relief in federal courts or by arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1-14.

GAC filed its answer on May 5, 1976 stating that the answer was "as to all matters in which arbitration is not being sought by defendant and as to all issues which the court may deem unarbitrable." GAC did not raise the issue of arbitration as an affirmative defense, nor did it ask for a stay in the proceedings for the purpose of demanding arbitration or arbitrating the dispute. GAC also counterclaimed, asking the court to enforce the contractual obligations or, in the alternative, for damages in the sum of $1,030,000,000 and costs.

The parties prepared a voluminous pre-trial order which was signed by the court and filed in August 1977 in which there was nothing mentioned at any point about arbitration rights, although GAC prepared its portion of the order. I & M and Detroit were involuntarily joined as defendants at the instance of GAC on some issues different from those asserted against UNC.

The first demand for arbitration came on November 30, 1977 and made its way into the record at page 5455 of the transcript of the record proper at a point where it took over 2,000 additional pages of transcript of proceedings to detail the progress of the suit.

Thereafter, for a total period of over two years, dating from the filing of the first complaint up to the demand for arbitration, the parties were in and out of the district court, the federal courts, and this Court dozens of times on mo-

tions and interlocutory appeals. Most of the activity in the district court concerned discovery proceedings for which the parties obviously expended millions of dollars. GAC claimed to have submitted 6,000,000 pages of material for UNC to inspect and claimed that UNC had actually copied approximately 180,000 pages. GAC alleged that producing the documents and answering interrogatories propounded by UNC had involved on its part the efforts of more than 37 lawyers, 19 paraprofessionals, 80 management personnel and engineers, plus secretarial and clerical personnel. The total hours allegedly consumed by April 19, 1977 was estimated to be 34,700. Over 100 depositions were taken resulting in 16,000 pages of testimony and 2,785 deposition exhibits. GAC contended that the parties had designated approximately 11,000 exhibits. UNC claimed that GAC had copied 500,000 pages of its records.

1. *Applicability of The Federal Arbitration Act*

Although there was considerable controversy at trial over whether the state or federal statutes govern the arbitration rights of the parties, the trial court concluded that it had jurisdiction under the Federal Arbitration Act, 9 U.S.C. §§ 1-14. The parties now agree with this judgment, as do we.

GAC insisted below that the federal act applies while UNC was contending that the New Mexico Uniform Arbitration Act governs. Sections 44-7-1 to 22, N.M.S.A. 1978. The trial court first held with UNC, but in the decision being appealed, concluded that jurisdiction was present under both acts. GAC complains that the record does not show that the court decided the issue based on the federal act, although concluding that it applied. We cannot go behind a valid conclusion to invalidate it by showing that the judge reached it for the wrong reasons.

Tsosie v. *Foundation Reserve Insurance Company*, 77 N.M. 671, 427 P.2d 29 (1967); *Holmes* v. *Faycus*, 85 N.M. 740, 516 P.2d 1123 (Ct.App. 1973).

The federal act provides, in § 3, that when a proceeding is brought in court involving any issue referrable to arbitration, the court "shall on application of one of the parties stay the trial until such arbitration has been had . . . providing the applicant for the stay of the action is not in default in proceeding with such arbitration." The statute does not specifically mandate that a demand for arbitration must be made before application is made to the court for a stay. UNC claims that GAC is in "default" under the terms of this statute and has therefore waived its right to seek arbitration.

2. *Forum for Question of Waiver*

GAC insists that the arbitration board and not the court should decide whether GAC has waived its rights to arbitration. Although GAC relies on authority to the contrary,[1] at least a strong majority of courts take jurisdiction over the issue with many finding that waiver has occurred. *Demsey & Associates* v. *S.S. Sea Star*, 461 F.2d 1009 (2d Cir. 1972); *Burton-Dixie Corp.* v. *Timothy McCarthy Const. Co.*, 436 F.2d 405 (5th Cir. 1971); *Cornell & Company* v. *Barber & Ross Company*, 360 F.2d 512 (D.C. Cir.

[1] *Hanes Corp.* v. *Millard*, 531 F.2d 585 (D. C. Cir. 1976); *World Brilliance Corp.* v. *Bethlehem Steel Co.*, 342 F.2d 362 (2d Cir. 1965); *Lundell* v. *Massey-Ferguson Services N.V.*, 277 F. Supp. 940 (N.D. Iowa 1967); *Auxiliary Power Corporation* v. *Eckhardt & Co.*, 266 F. Supp. 1020 (S.D.N.Y. 1966); *Lowry & Co.* v. *S.S. Le Moyne D'Iberville*, 253 F. Supp. 396 (S.D.N.Y. 1966), *appeal dismissed*, 372 F.2d 123 (2d Cir. 1967).

1966); *American Locomotive Co.* v. *Gyro Process Co.*, 185 F.2d 316 (6th Cir. 1950).[2]

The Federal Arbitration Act, 9 U.S.C. § 3, clearly mandates that a court in which a case is pending, and a stay is requested for arbitration, has jurisdiction to determine whether the movant is "in default in proceeding with such arbitration. " Our case was in this precise posture. We hold that the judge was not in error in assuming jurisdiction to decide the question of waiver.

3. *Question of Waiver*

Although there is disagreement from case to case as to what set of facts will justify a holding that a party has waived his rights to arbitration, the federal courts have developed general principles that are useful in appraising this issue. It has been held that the Federal Arbitration Act evidences a strong federal policy favoring the enforcement of arbitration agreements. *Hanes, supra; Demsey,*

[2] Other courts that have decided the issue of waiver and found that rights have been lost are: Circuit Courts: *E. C. Ernst, Inc.* v. *Manhattan Const. Co. of Tex.*, 559 F.2d 268 (5th Cir. 1977; on rehearing); *Gutor International AG* v. *Raymond Packer Co., Inc.*, 493 F.2d 938 (1st Cir. 1974); *E. I. Du Pont De Nemours & Co.* v. *Lyles & Lang Const. Co.*, 219 F.2d 328 (4th Cir. 1955), *cert. denied*, 349 U.S. 956 (1955); *American Locomotive Co.* v. *Chemical Research Corp.*, 171 F.2d 115 (6th Cir. 1948), *cert. denied*, 336 U.S. 909 (1949); *Galion Iron Works & Mfg. Co.* v. *J. D. Adams Mfg. Co.*, 128 F.2d 411 (7th Cir. 1942). District Courts: *Weight Watch. of Quebec Ltd.* v. *Weight W. Int., Inc.*, 398 F. Supp. 1057 (E.D.N.Y. 1975); *Liggett & Myers Incorporated* v. *Bloomfield*, 380 F. Supp. 1044 (S.D.N.Y. 1974); *Sulphur Export Corporation* v. *Carribean Clipper Lines, Inc.*, 277 F. Supp. 632 (E.D. La. 1968); *United Nations Children's Fund* v. *S/S Nordstern*, 251 F. Supp. 833 (S.D.N.Y. 1966). *See also N&D Fashions, Inc.* v. *DHJ Industries Inc.*, 548 F.2d 722 (8th Cir. 1977); *Gulf Central Pipeline Co.* v. *Motor Vessel Lake Placid*, 315 F. Supp. 974 (E.D. La. 1970).

supra; Carcich v. *Rederi A/B Nordie*, 389 F.2d 692 (2d Cir. 1968). The reasons for the encouragement of arbitration are to ease the congestion in the court systems, to speed up the resolution of disputes, and to afford a more economical means of disposing of cases. *Griffin* v. *Semperit of America Inc.*, 414 F. Supp. 1384 (S.D. Tex. 1976). *See also Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974); *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 541 F.2d 1263 (7th Cir. 1976).

As is true in other types of contracts, a party may waive certain terms, but in arbitration agreements the courts hold that all doubts as to whether there is a waiver must be resolved in favor of arbitration. *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), *cert. dismissed per stipulation*, 364 U.S. 801 (1960); *Bigge Crane and Rigging Co.* v. *Docutel Corporation*, 371 F. Supp. 240 (E.D.N.Y. 1973).

The party asserting the default in pursuing arbitration bears a heavy burden of proving waiver. *General Guar. Ins. Co.* v. *New Orleans General Agency, Inc.*, 427 F.2d 924 (5th Cir. 1970); *Hilti, Inc.* v. *Oldach*, 392 F.2d 368 (1st Cir. 1968).

The courts generally hold that dilatory conduct by the party seeking arbitration, unaccompanied by prejudice to the opposing party, does not constitute waiver. *Demsey, supra; Carcich, supra.* Waiver cannot be inferred merely from a party's attempt to meet all issues raised between it and another party. *Germany* v. *River Terminal Railway Company*, 477 F.2d 546 (6th Cir. 1973); *Romnes* v. *Bache & Co., Inc.*, 439 F. Supp. 833 (W.D. Wis. 1977). "'[D]efault' under the [Federal Arbitration Act] may not rest mechanically on some act such as the filing of a complaint or answer but must find a basis in prejudice to the objecting party." *Batson Y. & F. M. GR., Inc.* v. *Saurer-Allma GmbH-Allgauer M.*, 311 F. Supp. 68, 73 (S.C. 1970).

It must appear that the delay in requesting arbitration was an intentional relinquishment of the right to arbitrate. Such intention may be inferred when a party takes action inconsistent with its right to demand arbitration. *Weight Watchers, supra. See Cornell, supra; The Belize,* 25 F. Supp. 663 (S.D.N.Y. 1938). It is the objective manifestation of intent upon which the opposing party may rely. The question should be determined by the trier of facts based on the evidence in each case. *Burton-Dixie, supra; Weight Watchers, supra.* An appellate court should accept such factual determination if supported by substantial evidence. *Burton-Dixie, supra; Galion Iron Works, supra.*

In *Cornell, supra,* the trial court denied a stay under 9 U.S.C. § 3, because the party was "in default in proceeding with such arbitration," and stated:

> A party waives his right to arbitrate when he actively participates in a lawsuit or takes other action inconsistent with that right. Once having waived the right to arbitrate, the party is necessarily "in default in proceeding with such arbitration."
>
> Before filing the present motion, appellant (1) moved for a transfer of venue to the Eastern District of Pennsylvania, (2) filed an answer to appellee's complaint and a counterclaim, and (3) filed notice of depositions, took the deposition of an official of appellee, and procured the production of various records and documents. As the District Court stated:
>
> > [T]he litigation machinery had been substantially invoked and the parties were well into the preparation of a lawsuit by the time (some four months after the complaint was filed) an intention to arbitrate was communicated by the defendant to the plaintiff.

360 F.2d at 513. (Footnotes omitted.)

In *Weight Watchers, supra,* the court made a determination as to the elements of waiver in these cases, stating:

> The factors upon which the waiver question appears to have turned most frequently against the party seeking to compel arbitration are his dilatory conduct in seeking arbitration, usually coupled with his gaining of an undue advantage in the judicial forum or other substantial prejudice to the opposing party, or any other actions taken by the moving party which are sufficiently inconsistent with his seeking arbitration. Examining the circumstances of a particular case, it is usually the absence of one or more of these factors that forms the basis for concluding there has been no waiver.

398 F. Supp. at 1059. (Footnotes omitted.)

As a basis for holding that waiver had been correctly determined, the court in *Burton-Dixie, supra,* stated the evidence to be as follows:

> [A]t no time before answering the complaint in the instant lawsuit did McCarthy demand that the matter be submitted to the architect or to arbitration. Even when Burton-Dixie filed suit against McCarthy, McCarthy did not attempt to invoke the arbitration provision in the contract. In its answer to the complaint, McCarthy did not ask the court to stay proceedings pending arbitration, but rather denied liability and set up as an affirmative defense Burton-Dixie's failure to arbitrate. Moreover, McCarthy impleaded as third-party defendants two of its subcontractors and proceeded to litigate the dispute over the defective roof.

436 F.2d at 408-409. The court concluded that McCarthy waived its right to insist upon arbitration.

The United States Court of Appeals in *Demsey, supra*, after analyzing numerous cases which hold that there was no waiver under the particular facts, stated:

> We have found no cases, however, where arbitration has been allowed after a party has answered on the merits, asserted a cross-claim that was answered, participated in discovery, failed to move for a stay, and gone to trial on the merits.
>
> We can think of no clearer case of prejudice than we have here in this case. The substantial expense to all concerned that was involved in the trial of all the factual and legal issues in the case, including those raised by Jordan's cross-claims, was caused by Jordan's full participation in the pretrial procedures and in the trial on the merits, despite its mere allegation of the arbitration clause in the voyage charter as a defense. We think it would be a gross miscarriage of justice now to require a retrial by arbitration of any of these issues.

461 F.2d at 1018.

In *Gavlik Const. Co.* v. *H. F. Campbell Co.*, 526 F.2d 777, 783 (3d Cir. 1975), the court stated: "Recent cases have only found waiver where the demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery." (Citing *Demsey, supra; American Locomotive* v. *Gyro, supra; Ernst, supra; Liggett, supra;* and *Sulphur Export, supra.*)

Failing to invoke arbitration for ten months from the date the suit was commenced, while at the same time obtaining many benefits from pre-trial discovery that would not have been available had they reasonably demanded arbitration, was held to constitute waiver of the arbitration provision in *Liggett, supra.* The parties demanding arbitration had answered and counterclaimed without asserting their right to arbitration, but they had actively

participated in the discovery process and obtained a number of extensions. The court held that their acts and conduct had been prejudicial and thus constituted waiver.

In *E. C. Ernst, supra,* the court found waiver, stating:

> When one party reveals a disinclination to resort to arbitration on any phase of suit involving all parties, those parties are prejudiced by being forced to bear the expenses of a trial, which in this case was quite lengthy. Arbitration is designed to avoid this very expense. Substantially invoking the litigation machinery qualifies as the kind of prejudice to Manhattan that is the essence of waiver. (Citations omitted.)

559 F.2d at 269.

A party to a lawsuit who claims the right to arbitration must take some action to enforce that right. *Burton-Dixie, supra.* This must be done within a reasonable time after suit is filed. *Demsey, supra; American Locomotive* v. *Gyro, supra.*

The courts have held a variety of acts to be inconsistent with a party's alleged reliance on arbitrating the dispute in question. The determination of waiver seldom turns on a single inconsistent act or failure to act. Some of the conduct or acts of a party in relationship to a claim subject to arbitration that have been considered by themselves, or in conjunction with others, to constitute default or waiver are as follows: Answering a complaint, *Demsey, supra; Cornell, supra; Weight Watchers, supra; Liggett, supra;* counterclaiming in a judicial proceeding, *Demsey, supra; Cornell, supra; American Locomotive* v. *Gyro, supra; Liggett, supra;* filing a complaint, *Gutor International, supra; Bank of Madison* v. *Graber,* 158 F.2d 137 (7th Cir. 1946); *Galion Iron Works, supra;* participating in a discovery process in a lawsuit, *Demsey, supra; Cornell, supra; Liggett, supra;* moving for summary judgment, *Weight Watchers, supra;* going to trial on the merits, *Demsey,*

supra; Blake Construction Company v. *United States*, 252 F.2d 658 (5th Cir. 1958); *Radiator Speciality Co.* v. *Cannon Mills*, 97 F.2d 318 (4th Cir. 1938).

Preparation for trial by a party based on the belief that the other party does not desire or intend to make a demand for arbitration has been held to constitute substantial prejudice which may invoke a waiver or constitute a default under the Federal Arbitration Act. *Demsey, supra; Weight Watchers, supra.*

The courts also consider any advantage that may have been received by a party that might not otherwise have been available to the party under an arbitration proceeding by reason of participating in the discovery process. *Liggett, supra.* Neither the federal statutes nor the rules of AAA give a party an absolute right to demand discovery. As a general rule, discovery is very limited in arbitration proceedings. Once a district court has stayed judicial proceedings pending arbitration, the parties may not continue discovery in the district court. *Mississippi Power Company* v. *Peabody Coal Company*, 69 F.R.D. 558 (S.D. Miss. 1976); *Commercial Solvents Corp.* v. *Louisiana Liquid F. Co.*, 20 F.R.D. 359 (S.D.N.Y. 1957); *Cavanaugh* v. *McDonnell & Company*, 357 Mass. 452, 258 N.E. 2d 561 (1970). In *Bigge, supra*, a federal district court did enforce discovery which had been ordered by the arbitrator, but did so on a showing of necessity rather than of mere convenience. Later cases have denied discovery, but, based on *Bigge, supra*, have indicated that discovery might be proper in extraordinary circumstances. *Coastal States Trading, Inc.* v. *Zenith Nav. S.A.*, 446 F. Supp. 330 (S.D.N.Y. 1977); *Levin* v. *Ripple Twist Mills, Inc.*, 416 F. Supp. 876 (E.D. Pa. 1976).

Discovery procedures are often the most expensive and time-consuming elements of a court trial, and thus have often been considered to be inconsistent with the reasons for arbitration. *Commercial Solvents, supra.* In most cases, discovery in arbitration is limited to the discovery available under the Arbitration Act itself. M. Domke, The Law and Practice of Commercial Arbitration, § 27.01 (1968); G. Goldberg, A Lawyer's Guide to Commercial Arbitration, § 3.03 (1977). The only discovery mentioned in the Act is the taking of depositions of witnesses who cannot be subpoenaed or who are unable to attend the hearing.

No one act or a specific series of acts has been held consistently to indicate waiver. The courts have looked to the totality of the proof in each case to arrive at a decision. We take into consideration all of the material facts to determine whether GAC defaulted on its obligation to make a timely demand for arbitration and a stay of proceedings and thus waived its rights.

We ask whether GAC intended to arbitrate or litigate. However, it would be a mistake to assume that each of these courses is mutually exclusive of the other. We must inquire whether it can be inferred from the circumstances that the intent of GAC was to litigate *and* arbitrate. The purpose could plausibly be to preserve the right to arbitrate and at the same time litigate down to the last possible moment. Thus, we examine not only the acts of GAC that occurred prior to the time the injunction was entered on April 2, 1976 but the conduct or inaction of GAC thereafter as bearing on the real designs of the company.

It is hornbook law that intent is a state of mind. As such, it generally remains hidden within the brain where it was conceived. It is rarely, if ever, susceptible of proof by direct evidence. It must be inferred from the words, acts or conduct of the party entertaining it as well as the other attendant facts and circumstances. No citations as to these principles are necessary.

In applying the above law to the facts in this case we consider the challenges specified by GAC. As to waiver, GAC challenged six of the district court's findings of fact

that: (a) the preliminary injunction did not prohibit GAC from demanding arbitration in the district court; (b) for twenty-seven months GAC did not "in any way manifest its intention or desire to arbitrate rather than litigate"; (c) GAC made numerous motions for extensions and discovery orders and "represented to the district court that such orders were necessary for its preparation for trial"; (d) information obtained from UNC by GAC by way of discovery would not otherwise have been available to it; (e) UNC had been prejudiced and would be irreparably injured if a stay were ordered; and (f) GAC was in default and had relinquished any rights to arbitrate.

(a) The extent to which GAC was *prohibited*, if at all, by the injunction from making demand for arbitration and from requesting a stay of the proceedings in the district court is a very crucial matter with GAC. That company contends that the injunction absolutely prohibited it from demanding arbitration outside New Mexico and that arbitration within New Mexico was ordered to be conducted only under the supervision of the district court. GAC argues that this was such a violation of its rights that it had no duty to pursue the matter further in the trial court. GAC claims that its actions after the issuance of the injunction were strictly in self-defense and were forced upon it by the illegally obtained injunction.

It is further claimed by GAC that its actions prior to the issuance of the injunction on April 2, 1976 were not such as would justify a finding of waiver and that most of the conduct of GAC upon which UNC relies for support of its allegation of waiver occurred after GAC was unlawfully restrained from seeking arbitration.

We look at all the evidence. The hearing on April 2, 1976 on the motion for an injunction is most significant. The motion did not contain any plea for restraining arbitration; and the temporary restraining order mentioned only restraints on suing or counterclaiming. The first time that

the record shows notice to GAC that the court was even considering enjoining arbitration demands was in the judge's letter of March 30, three days before the hearing. However, GAC did not object to holding the hearing insofar as it pertained to arbitration, did not demand arbitration in the interim, did not seek to continue the hearing while it took the proper steps to demand arbitration and to request a stay in the suit, and did not raise the issue of its rights under the Federal Arbitration Act at the hearing on the motion.

The reliance of GAC on § 44-7-2 of the New Mexico Uniform Arbitration Act, which provides for an automatic stay of court proceedings pending arbitration on "application therefor", indicates that GAC was fully aware of this simple means of putting an immediate halt to the litigation, yet its lawyers talked only of the "possibility of arbitration". Bearing in mind that the colloquy among lawyers and judge may not ordinarily be considered to dispute the judgment, it is still admissible as being indicative of the intent of GAC, with regard to arbitration as opposed to litigation upon which UNC and the court were entitled to rely. GAC only alerted the court to its right to demand arbitration under the New Mexico Uniform Arbitration Act, where it would be entitled to an automatic stay in the event that it demanded arbitration, and made references only to arbitration "in this case". Thus, another well-known risk was taken by GAC, i.e., that it would not later be permitted to complain because of failing to properly object. N.M.R. Civ. P. 46, N.M.S.A. 1978; N.M.R. Civ. App. 11, N.M.S.A. 1978.

Although the court offered clarification of what was meant by a right to arbitrate "in this forum", none was ever requested at that time or any later time, nor was any effort made to determine what the judge meant when he said that if GAC decided to exercise its rights to arbitration it would be done "subject to the supervision of this court." The latter expression could be interpreted in many

ways, one of which could be that the judge believed that he had the power to refuse to stay the proceedings if the evidence showed a default on GAC's part in demanding arbitration that amounted to a waiver. Another probability is that the court would want to retain jurisdiction over any contested items in the contract that were not subject to arbitration. Furthermore, the court would have the jurisdiction to inquire whether or not there was in fact a valid contract providing for arbitration. No clarification was sought and none was thereafter offered.

There is nothing in the preliminary injunction that prohibited GAC from demanding arbitration at any time by serving a demand on UNC in New Mexico, without regard for the location at which the arbitration would take place. This would have set the stage for a claim by GAC that the court did not have jurisdiction. The argument that GAC could do nothing with regard to arbitration is not persuasive. Nor is the claim that it had to await the decision of the U.S. Supreme Court before it could make any demands for arbitration. The U.S. Supreme Court decision did not change the portion of the preliminary injunction giving GAC the right to demand arbitration in New Mexico.

Common sense dictates that a litigant that has been so capably represented by such a host of outstanding lawyers, who have meticulously handled every other infinitesimal detail, and who have verbally displayed such ferocious passion for arbitration, could have found a way to say: "Judge, we want to arbitrate." There were no restraints on filing a motion in the trial court for leave to arbitrate. Admittedly, it is not called for under the federal law, but the failure of GAC to adopt such a simple and plausible course of action is a commentary on the validity of its claimed intent to arbitrate.

Inherent in GAC's argument is the impermissible presumption that if it had made demand for arbitration the trial court would have acted unlawfully rather than follow

the mandate of the Federal Arbitration Act. We must presume that the court would have done its "supervision" in accordance with that law. The law presumes that rulings of district courts have validity. *Coastal Plains Oil Company* v. *Douglas*, 69 N.M. 68, 364 P.2d 131 (1961); *Carlile* v. *Continental Oil Company*, 81 N.M. 484, 468 P.2d 885 (Ct. App. 1970). *A fortiori*, the law must presume that rulings which district courts may be called upon to make in the future will likewise be valid.

As suggested by GAC, the court's finding that the preliminary injunction did not prohibit GAC from demanding arbitration with UNC "*in this forum*" shows a tinge of legal conclusion. The thrust of GAC's challenge to this finding is more in the nature of a complaint that it was wrong for the court to prohibit arbitration *in other forums*. The U.S. Supreme Court agreed with this theory; however the finding, or the mixed finding and conclusion, is obviously correct because the prohibition did not run against demanding arbitration with UNC in New Mexico. In order to assert any right to arbitration under 9 U.S.C. § 3, it was mandatory that GAC make a demand for arbitration and make application to the Santa Fe County District Court for a stay in these proceedings, at which time the trial court would have been obligated under federal law to determine whether GAC was in default in demanding arbitration. This is exactly what occurred after the U.S. Supreme Court mandate came down.

Early in its appeal, GAC, in discussing the scope of review available to this court, argued that we should not apply the substantial evidence rule. The argument is, since the trial judge reached his findings by the use of documentary evidence, the pleadings and the statements of the attorneys, this Court is in as good a position to determine the facts by preponderance of the evidence as was the trial judge. We think this case is not a good subject for the application of that principle. We hold that *Valdez* v. *Sal-*

azar, 45 N.M. 1, 107 P.2d 862 (1940) is more in point where this Court stated:

> Where all or substantially all of the evidence on a material issue is documentary or by deposition, the Supreme Court will examine and weigh it, and will review the record, giving some weight to the findings of the trial judge on such issue, and *will not disturb the same upon conflicting evidence unless such findings are manifestly wrong or clearly opposed to the evidence.* (Emphasis added.)

Id. at 7, 107 P.2d at 865.

We affirm the trial court's ruling that the preliminary injunction did not prohibit GAC from demanding arbitration in that court.

(b) GAC filed numerous pleadings which stated that it did not intend to waive its rights to arbitration. However, the trial court found that for a period of twenty-seven months GAC did not "in any way manifest its *intention or desire* to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement." (Emphasis added.) GAC's intentions are the number one question in this case. GAC claims that its numerous statements that it did not intend to *waive its right* to demand arbitration was sufficient to establish its intent. UNC urges that an intention to *preserve the right to demand arbitration* is not the same as an intention or desire *to arbitrate.* UNC relies on the other acts and conduct of GAC to prove that a good faith intent to arbitrate was not shown.

The record shows that GAC was fully aware of the perils of dilatory conduct in asserting its arbitration rights. This knowledge surfaced in its first pleading. However, it took obvious risk after obvious risk. It did not assert arbitration as an affirmative defense in its answer, thus taking the chance of having the issue excluded under N.M.R. Civ. P. 8(c) and 12(b), N.M.S.A. 1978, which call for every defense in law or fact to be "asserted." "The failure to plead the arbitration clause as a defense to the lawsuit will be considered a waiver of the party's rights arising under such clause." M. Domke, *supra.* § 19.01, page 181 (1968); *Almacenes Fernandez, S.A.* v. *Golodetz,* 148 F.2d 625 (2d Cir. 1945). Generally the courts have held that failure to plead an affirmative defense results in the waiver of that defense; and it is excluded as an issue. *Radio Corporation of America* v. *Radio Station KYFM, Inc.,* 424 F.2d 14 (10th Cir. 1970).

GAC further imperiled its position by failing to assert arbitration as a defense in the pre-trial order. Parties are expected to disclose at a pre-trial hearing all legal and factual issues which they intend to raise in the lawsuit. N.M.R. Civ. P. 16, N.M.S.A., 1978; *Becker* v. *Hidalgo,* 89 N.M. 627, 556 P.2d 35 (1976); *Harvey* v. *Eimco Corp.,* 33 F.R.D. 360 (E.D. Pa. 1963); *Burton* v. *Weyerhaeuser Timber Co.,* 1 F.R.D. 571 (D. Ore. 1941). The parties are limited to the issues contained in the order and must not introduce issues not so contained at trial. *Fowler* v. *Crown-Zellerbach Corporation,* 163 F.2d 773 (9th Cir. 1947).

Although these two lapses by GAC and others cited are not conclusive of voluntary waiver, they do add to the volume of proof that the court and UNC were misled into believing that GAC intended to litigate the issues and that its intent to arbitrate was not as strong as it now contends.

An attempt to reserve a right inconsistent with that asserted is ineffectual. *The Belize, supra; Commercial Bank* v. *Central Nat. Bank,* 203 S.W. 662 (Mo. App. 1918).

There was no error in the trial court's finding that GAC did not manifest an intention and desire to arbitrate, as opposed to litigating. The finding is based upon substantial evidence. We will not disturb such a finding. *Montoya* v. *Travelers Ins. Co.,* 91 N.M. 667, 579 P.2d 793 (1978).

(c) The court's finding that GAC made repeated representations to the district court that it needed extensions of time and in "all" instances said the purpose was to enable it to "prepare for trial", is challenged on grounds that most of the acts occurred after the issuance of the preliminary injunction and that *every* such action was not accompanied by the alleged representation. However, GAC failed to comply with N.M.R. Civ. App. 9(d), N.M.S.A. 1978, which requires that the substance of all the evidence be stated with proper transcript references. The same is true of GAC's challenges to the court's findings that UNC had provided *all* materials to GAC sought on discovery and that GAC obtained "huge amounts of information from UNC which would not otherwise be available to it." We hold that challenges (c) and (d) fell short of complying with Rule 9(d) and will not be considered. *Perez* v. *Gallegos*, 87 N.M. 161, 530 P.2d 1155 (1974); *Galvan* v. *Miller*, 79 N.M. 540, 445 P.2d 961 (1968). However, as to the merits of the two challenges, careful scrutiny of the record discloses insubstantial support for the contentions. Even if error had been committed as to one or both issues, it would not be dispositive of the case.

(e) The court's finding that UNC had been prejudiced by GAC's default in demanding arbitration is attacked on the basis that there was no such prejudice shown by the events prior to the entry of the injunction against arbitration and that, after the entry of that injunction, GAC's conduct could not be considered in determining waiver. This issue is partially resolved by our holding that there is substantial evidence that GAC did not properly manifest its intention or desire to arbitrate during a period of twenty-seven months from the time of the filing of the first lawsuit to a point well into the trial of the second case.

By that time, UNC had spent millions of dollars on discovery proceedings and trial preparation. UNC takes the position that GAC obtained the advantages of discovery that would not have been available to GAC as a matter of right under the Federal Arbitration Act.

GAC argues that the court's findings of prejudice should be categorized as a legal conclusion and that it was not incumbent upon GAC to establish the lack of an evidentiary basis for the finding as required by Rule 9(d). Even though it is for the court to conclude whether there is prejudice, it is clear that a conclusion must be based on findings of fact that have support in the record. The conclusion fails when it is demonstrated that it has no proper support in the facts. Even though the substantiality of the evidence on this point may not be properly before us, we nevertheless hold on the merits that the evidence in the record substantiates a finding that GAC's default in demanding arbitration caused material prejudice to UNC both before and after the preliminary injunction was issued.

(f) The last finding challenged is that GAC was in default and had relinquished any right to arbitrate. This finding overlaps many of the others. This holding must be predicated upon finding substantial evidence from the entire record.

This complex, multi-party, multi-issue litigation was within days of final solution at the trial level when the first *demand* was made for arbitration. This very simple act of stating, in writing: "We want to arbitrate", followed by a motion for a stay of litigation, would have challenged the jurisdiction of the court to proceed. Our search of the record reveals no instance where these words were either written or spoken until November of 1977.

Without reiterating the facts relied upon, we hold that there is substantial evidence to support the court's finding that GAC was in default and thus waived its right to arbitration.

The parties expressly provided that the AAA Rules would govern arbitration under the 1973 Uranium Supply Agreement. GAC claims that waiver is entirely precluded under § 46(a) of these rules which specifies:

> No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

GAC relies upon *People ex rel. Delisi Const. Co., Inc.* v. *Board of Ed.*, 26 Ill. App. 3d 893, 326 N.E. 2d 55 (1975). This case is distinguishable in that it involved a delay by the party seeking arbitration only for a period during which the validity of the contract to arbitrate was being decided, as opposed to trial preparation and trial in our case. Furthermore, the Illinois Court recognized that only arbitrable questions are covered by §46(a) by stating:

> Moreover, the arbitration clause provides that *arbitrable questions* be decided "in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . . (Emphasis added.)
>
> 326 N.E.2d at 57.

UNC cities M. Domke, *supra*, at 264, to support its contention that Rule 46(a) is designed only to provide that, after arbitration has been commenced, there is no waiver by participation in judicial proceedings *supplementary to* and *in aid of arbitration*. UNC argues that, regardless of the AAA Rule, a party may be in default in demanding arbitration, as specifically mentioned in the Federal Arbitration Act, and therefore, have no arbitrable questions remaining which could be governed by § 46(a). In the latter situation, it is the province of the court to determine whether there has been a default. The parties are precluded from contracting to exclude the court from jurisdiction over this issue. *American Sugar Refining Co.* v. *The Anaconda*, 138 F.2d 765 (5th Cir. 1943), *aff'd*, 322 U.S. 42 (1944); *Ocean Science & Eng., Inc.* v. *International Geomarine Corp.*, 312 F. Supp. 825 (Del. 1970).

4. *Procedural Issues*

GAC argues that the procedures followed by the court below in arriving at a decision were defective in that (a) the court below failed to exercise its independent judicial discretion in entering its findings and conclusions; and (b) the court erred in disposing of GAC's arbitration claim without a trial-type evidentiary hearing.

(a) GAC states that the findings of fact and conclusions of law were adopted entirely from the proposed findings and conclusions submitted by UNC. GAC argues that this procedure was in violation of N.M.R. Civ. P. 52(B)(a)(5) and (7), N.M.S.A. 1978, and also in violation of the leading case law.

In reviewing the cases cited by GAC it appears that the practice of adopting findings and conclusions entirely as submitted by one of the parties has been held to be error in only the most extreme circumstances. *See Mora* v. *Martinez*, 80 N.M. 88, 451 P.2d 992 (1969); *Chicopee Manufacturing Corp.* v. *Kendall Company*, 288 F. 2d 719 (4th Cir. 1961), *cert. denied*, 368 U.S. 825 (1961). Most of the cases hold that, although the practice is not to be commended, it is not reversible error so long as the finding adopted are supported by the record. *United States* v. *El Paso Gas Co.*, 376 U.S. 651 (1964); *U.S.* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944); *Bradley* v. *Maryland Casualty Company*, 382 F.2d 415 (8th Cir. 1967). The prodigious record in this case provides ample support for the court's findings.

The court entered an order expressly refusing all requested findings and conclusions inconsistent with those announced in its decision. GAC urges that there was a failure to strictly comply with Rule 52(B)(a)(5) since the judge did not mark GAC's requested findings and conclu-

sions "refused". We find no prejudice and thus no reversible error. *Martinez* v. *Research Park, Inc.*, 75 N.M. 672, 410 P.2d 200 (1966), *rev'd on other grounds*, 86 N.M. 151, 520 P.2d 1096 (1974).

As to Rule 52(B)(a)(7), GAC argues that the court adopted the findings and conclusions offered by UNC and, by separate order, refused GAC's "inconsistent" findings and conclusions. The gist of this argument is that this violates the single document requirement of the rule. However, the word "decision" as used in Rule 52 means "findings of fact and conclusions of law." *Trujillo* v. *Tanuz*, 85 N.M. 35, 38, 508 P.2d 1332, 1335 (Ct.App. 1973). Rule 52 contains no requirement that an order *refusing* proposed findings be included in the same document as the court's decision.

(b) GAC's motion for a stay requested a hearing. The trial court gave the parties short notice to submit affidavits and briefs on the facts and the law, but did not hear oral argument or testimony. GAC did not object at the trial level to the sufficiency of the hearing, did not complain that it was being deprived of due process, and did not tender any additional evidence in support of the motion. This issue is raised for the first time on appeal. GAC now argues that it was entitled to a trail-type hearing, claiming that the Federal Arbitration Act and the constitutional due process clauses require such a hearing. The question, however, is what type of hearing is "appropriate to the nature of the case." *Mullane* v. *Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950). We must look to the Federal Arbitration Act and the cases interpreting it.

Section 3 of the Federal Arbitration Act provides for a stay of pending court action on application of one of the parties when the trial court is satisfied that the issue involved is referrable to arbitration and that the applicant for the stay of court proceedings is not in default in proceeding with such arbitration. Section 4 of the Act, on the other hand, contemplates a situation where no court action

is pending. It allows for a party to petition any *United States District Court* for an order to compel arbitration, and provides for jury trial. *Prima Paint* v. *Flood & Conklin*, 388 U.S. 395 (1967) held that, under either section, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In that case, the Court said nothing regarding the procedures to be followed in deciding those limited issues.

Section 6 of the Federal Arbitration Act states: "Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided." Section 4 is the only exception to § 6. *World Brilliance, supra.*

Section 4 provides: "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed . . . ." By its literal language, § 4 is applicable only to United States District Courts. *See Robert Lawrence*, 271 F.2d at 407. We have found no authority which indicates that a party may petition a state court for an order to compel arbitration under § 4 of the Federal Arbitration Act. We therefore conclude that § 4 is not applicable to this case.

Except for claims brought pursuant to § 4 of the federal act, claims under that act are to be heard as motions rather than by trail. *World Brilliance, supra.* "Motions may be decided wholly on the papers, and usually are, rather than after oral examination and cross-examination of witnesses." *Id.* 342 F.2d at 366. Contrary to the arguments of GAC, *Prima Paint, supra*, does not change the import of the decision in *World Brilliance.*

GAC claims that the failure to accord it a hearing was a violation of its due process rights. The requirements of

due process are not technical, and no particular form of procedure is necessary for protecting substantial rights. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974). The circumstances of the case dictate the requirements. *Rivera-Lopez* v. *Gonzalez-Chapel*, 430 F. Supp. 704 (D. Puerto Rico 1975). The integrity of the fact-finding process and the basic fairness of the decision are the principal considerations. *Boykins* v. *Fairfield Board of Education*, 492 F.2d 697 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). Oral argument on a motion is not a due process right. *Spark* v. *Catholic University of America*, 510 F.2d 1277 (D.C. Cir. 1975); *Skolnick* v. *Spolar*, 317 F.2d 857 (7th Cir. 1963), *cert. denied*, 375 U.S. 904 (1963).

In our case, the trail judge was ending the second month of the trial on the merits, and had virtually lived with the participants in this controversy for over two years at the time the ruling complained of was made. The record was approaching the 10,000 page point, and exhibits were running into the hundreds of thousands of pages and were being measured by the running foot.

The parties had full opportunity to brief the facts and the law, and they filed extensive briefs with the court before this decision. Both sides filed requested findings of fact and conclusions of law.

Although UNC claims that GAC waived its right to a hearing by failing to properly object and alert the court to the right, if it had such right, we do not decide the issue of waiver. We hold instead that the hearing held by the court was "appropriate to the nature of the case". *Mullane, supra; World Brilliance, supra;* 9 U.S.C. § 6.

5. *Inconsistency of Proceedings.*

GAC claims that the actions of the trial court were inconsistent with the holdings of the U.S. Supreme Court in *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977). This bears on the district court's determination not to stay the

trial on the grounds that GAC had waived its right to arbitrate and that the New Mexico antitrust claims were not arbitrable as a matter of law.

In *General Atomic*, the Supreme Court ruled that, "it is not within the power of state courts to bar litigants from filing and prosecuting *in personam* actions in the federal courts." 434 U.S. at 12. The district court then modified its April 2, 1976, injunction to exclude from its terms and conditions all *in personam* actions in federal courts "and all other matters mandated to be excluded from the operation of said preliminary injunction by the Opinion of the United States Supreme Court, dated October 31, 1977."

The district court had jurisdiction over the arbitration controversy under the Federal Arbitration Act, at least up to approximately sixty days into the trial of the case on the merits, when GAC made demand for arbitration and moved for a stay in the proceedings. When GAC sought a stay the trial court had the obligation to determine whether the issues involved in the suit were referrable to arbitration under the agreements, and whether "the applicant for the stay is not in default in proceeding with such arbitration. . . ." 9 U.S.C. § 3. The trial judge made these determinations in favor of UNC. There is nothing in the Supreme Court's decision that prohibits this type of disposition since it comports with the federal statutes.

There was nothing in the amended injunction which prohibited GAC from demanding arbitration in the case to be conducted in any location, so long as an application was made to the district court to stay the pending trial. The Federal Arbitration Act prevented GAC from proceeding with arbitration without an order from Judge Felter. 9 U.S.C. § 3.

Furthermore, in *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978), decided after argument in this case, the Court observed: "Clearly, our prior opinion did not preclude the court from making findings concerning whether GAC had

waived any right to arbitrate. Nor did our prior decision prevent the Santa Fe court . . . from declining to stay its own trial."

6. *Arbitration of State Antitrust Laws*

The trial court held that claims raised under the New Mexico Antitrust Act, 57-1-1 to 6, N.M.S.A. 1978, were not arbitrable and that other claims in the suit were so intertwined with the antitrust claims, that none were arbitrable. Although we consider that our decision that GAC has waived its arbitration rights is controlling, in the interest of judicial economy, we decide the antitrust questions.

Even though the Federal Arbitration Act contemplates that *all* claims are arbitrable where there is a contract to arbitrate, the federal courts have established an exception where the federal antitrust laws are concerned. In reconciling two strong and conflicting federal policies, the federal courts have established the rule that claims under the Federal Antitrust Act are not arbitrable under the Federal Arbitration Act. *Applied Digital Tech., Inc.* v. *Continental Gas. Co.*, 576 F.2d 116 (7th Cir. 1978); *Cobb* v. *Lewis*, 488 F.2d 41 (5th Cir. 1974); *Power Replacements, Inc.* v. *Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968). The New York courts have held that claims arising under that state's antitrust act were not arbitrable under the New York Arbitration Act. *Schachter* v. *Lester Witte & Co.*, 52 A.D.2d 121, 383 N.Y.S.2d 316 (1976), *aff'd on other grounds*, 396 N.Y.S.2d 175, 364 N.E.2d 840 (1977); *Aimcee Wholesale Corp.* v. *Tomar Products, Inc.*, 21 N.Y.2d 621, 237 N.E.2d 223 (1968). We found no case on the issue of whether state antitrust claims are arbitrable under the Federal Arbitration Act. The parties cited none.

GAC argues that, by virtue of the supremacy clause of the United States Constitution, state antitrust claims cannot be applied to bar arbitration under the Federal Arbitration Act. We do not agree.

The policies underlying both federal and state antitrust laws are concurrent, as indicated by the legislative history of the federal act. During the debates on the federal legislation, Senator Sherman commented:

> Each State can and does prevent and control combinations within the limit of the State. This we do not propose to interfere with. The power of the State courts has been repeatedly exercised to set aside such combinations . . . .

21 CONG. REC. 2456 (1890).

Senator Sherman further stated that the act was designed to "arm the Federal courts . . . that they may cooperate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States . . ." and that the Act was "in this way to supplement the enforcement of the established rules of common and statute law by the courts of the several States." 21 CONG. REC. 2457 (1890).

Twenty-one states had constitutional or statutory antitrust laws when the Sherman Antitrust Act was passed on July 2, 1890. 26 Stat. 209. 15 U.S.C. § 1 *et seq.* Very shortly thereafter in 1891, the Territorial Legislature of New Mexico passed an antitrust act in which the pertinent and material language is almost identical with the federal law. Chapter 10, § 1 *et seq.*, page 28, *Acts of the Legislative Assembly of the Territory of New Mexico*, 1891. The New Mexico Constitution in Article IV, § 38, later provided that the Legislature "shall enact laws to prevent trusts, monopolies and combinations in restraint of trade."

To further emphasize the common purpose underlying antitrust enforcement and the cooperation between federal

and state authorities, we note that as late as the 95th Congress $11 million in federal grants were made available to aid the states in improving antitrust enforcement. Pub.L. 95-86. *See* S. Rep. No. 95-285 to accompany H. R. 7556, 95th Cong., 1st Sess. 18 (1977).

The underlying purposes behind both the federal and state Laws are the same, to establish a "public policy of first magnitude"; that is, promoting the national interest in a competitive economy. *American Safety Equipment, supra.* We perceive no "clash of competing fundamental policies" between the two statutes as GAC claims. We are convinced by the basic policy considerations expressed in the federal and New York cases holding that antitrust issues are not arbitrable. *American Safety Equipment, supra; Aimcee, supra.* The cases have developed a body of law that is supportive of an integrated federal-state policy mandating that our courts not abdicate their control over antitrust policy. *Aimcee, supra.*

The rationale for this principle is well-stated in *American Safety Equipment, supra.* The court reasoned that a claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy. The plaintiff is likened to a private attorney-general who protects the public's interest. Violations can affect hundreds of thousands—perhaps millions—and inflict staggering economic damage. "We do not believe that Congress intended such claims to be resolved elsewhere than in the courts." 391 F.2d at 827. The court thought it proper to ask whether contracts of adhesion between alleged monopolists and their customers should determine the forum for trying antitrust violations. "Since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest." *Id.* at 827. It would surely not be a way of assuring the customer that objective and sympathetic

consideration would be given to his claim. The court stated:

> We conclude only that the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make the outcome here clear.

Id. at 827-28.

The validity of these reasons does not vanish simply by exchanging the federal judge for one in a state court who is charged with the same responsibility to enforce a strong public policy against monopolistic practices.

"It is now cardinal doctrine that the public interest in the enforcement of antitrust laws makes antitrust claims inappropriate subjects for arbitration." *Hunt* v. *Mobil Oil Corporation,* 410 F. Supp. 10, 25 (S.D.N.Y., 1976), *cert. denied,* 434 U.S. 984 (1977). This strong language leaves no room for argument that, if you swap a large judge for a small one, public interest disappears.

The New York Court of Appeals in *Aimcee, supra,* held that the enforcement of the state's antitrust policy was of such extreme importance to all of its people that commercial arbitration was not a fit instrument for the determination of these controversies. The court reasoned that arbitrators are not bound by rules of law, and their decisions are essentially final. The awards may not be set aside for misapplication of the law. Records need not be kept upon which a review of the merits may be had. Arbitrators are not obliged to give reasons for their rulings or awards. The courts may be called upon to enforce arbitration awards which are directly at variance with the statutory law and the public policy as determined by the decisions of the court. *See generally Applied Digital, supra; Cobb, supra; Power Replacements, supra; American Safety Equipment, supra; Aimcee, supra;* and *Annot.,* 3 A.L.R. Fed. 918, § 2 (1970).

GAC cites several cases which hold that, in enacting the Federal Arbitration Act, Congress created federal substantive law which controls over inconsistent state substantive law. *E.g. Grand Bahama Petroleum Co.* v. *Asiatic Petroleum*, 550 F.2d 1320 (2d Cir. 1977); *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 541 F.2d 1263 (7th Cir. 1976); *Stokes* v. *Merrill Lynch, Pierce, Fenner & Smith*, 523 F.2d 433 (6th Cir. 1975); *Lawn* v. *Franklin*, 328 F. Supp. 791 (S.D.N.Y. 1971). In each of the cases cited by GAC, however, the Federal Arbitration Act was held to control over various *conflicting* state laws, other than state antitrust statutes.

We hold that the enforcement of state antitrust law by the courts rather than by arbitrators is entirely consistent with congressional intent because (1) the state and federal antitrust acts serve to protect the same societal interests, and (2) the Federal Arbitration Act itself provides that arbitration agreements in contracts involving commerce are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract " 9 U.S.C. § 2.

Title 9 U.S.C. § 2 has been construed by several courts. *Litton FCS, Inc.* v. *Pennsylvania Turnpike Commission*, 376 F.Supp. 579 (E.D. Pa. 1974), *aff'd by order*, 511 F.2d 1394 (3d Cir. 1975), turned on whether a state agency had authority to enter into the particular contract. The District Court held that before a state may limit conditions under which a public instrumentality, otherwise possessing the power to arbitrate, may contract to arbitrate, it must do so in a clear and express manner. The court found that the provisons of the Pennsylvania Arbitration Act did constitute an express limitation on the authority of the Turnpike Commission to contract in a manner contrary to such act. The court then held that the Federal Arbitration Act provided for the incorporation of state law governing enforceability of contracts. It is only when a state law contravenes

express provisions of the federal act that the state law must fail. If state law prohibits a public instrumentality from agreeing to arbitrate in a certain manner, the defense that the agency acted ultra vires, in agreeing to arbitrate in that manner, was available to the agency under the Federal Arbitration Act *"if such a defense would constitute 'grounds as exist at law or in equity for the revocation of any contract.'* " (Emphasis added; citation omitted). *Id.* at 587.

In *American Airlines, Inc.* v. *Louisville & Jefferson C. A. B.*, 269 F.2d 811 (6th Cir. 1959), the court reviewed the congressional intent behind the Federal Arbitration Act and stated with reference to arbitration agreements:

> [T]here appears no indication whatever of congressional intent that such agreements would be made valid, irrevocable and enforceable solely by virtue of the Federal arbitration statute.
>
> [T]he Federal Arbitration Statute was intended to declare no more than that agreements to arbitrate "involving commerce" . . . are by virtue of the Federal arbitration statute valid and enforceable, *unless by other Federal law or by State law such agreements are for other reasons to be held invalid or revocable or unenforceable.* (Emphasis added.)

Id. at 816.

The Federal Arbitration Act clearly does not require enforcement of arbitration agreements contained in contracts which are themselves void by operation of a state law which applies to contracts generally. *See Collins Radio Company* v. *Ex-Cell-O Corporation*, 467 F.2d 995 (8th Cir. 1972). Section 57-1-3, N.M.S.A. 1978, provides:

> All contracts and agreements in violation of the foregoing two sections [which prohibit monopolies and restraints of trade] shall be *void*. . . .

Since the federal and state antitrust laws protect the same interests of society, we do not perceive that Congress intended, by enacting the Federal Arbitration Act, to require arbitration under the terms of a contract which is challenged as being in violation of the state antitrust laws. Because of the policy reasons mentioned above, we deem that issues raised under the state antitrust act are not arbitrable.

GAC argues that several issues are unrelated to the antitrust claim and are severable. They argue that the court erred in not allowing arbitration of these other issues.

Whether all issues in the case were so intertwined with antitrust issues as to prohibit arbitration was a question which was answered in the affirmative in *Hunt, supra.* Citing *American Safety Equipment, supra,* and *Cobb, supra,* the court in *Hunt* stated the question to be:

> [W]hether the antitrust issues so permeate the entire case that it would not be "easy for an arbitrator to separate the antitrust issues from the other issues in the case, and to proceed to decide the arbitrable issues without inquiry into the antitrust issues."

410 F. Supp. at 26.

The standard of review is whether the trial court abused its discretion. *Applied Digital, supra; A. & E. Plastik Pak Co., Inc.* v. *Monsanto Co.,* 396 F.2d 710 (9th Cir. 1968). A review of the record in this case clearly indicates that the issues are "complicated, and the evidence extensive and diverse. . . ." *American Safety Equipment,* 391 F.2d at 827. It would not be "easy for an arbitrator to separate the antitrust issues from the other issues in the case, and to proceed to decide the arbitrable issues without inquiry into the antitrust issues." *Cobb,* 488 F.2d at 50. The lower court did not abuse its discretion in holding that all the issues in this case are so interwined with the antitrust issues that no issues are arbitrable.

7. *Arbitration with Duke and Commonwealth*

GAC contends that UNC has a duty to arbitrate jointly with GAC and Duke Power Company as well as Commonwealth Edison Company, two utility firms that were relying on GAC to supply them with uranium obtained from UNC under the 1973 Uranium Supply Agreement. Duke and Commonwealth had separate contracts under which GAC was obligated. However, GAC claimed that UNC's duty was to supply the uranium "in accordance with the terms and conditions" of the utility contracts. GAC urges that the arbitration clauses in the separate Duke and Commonwealth contracts are incorporated into the 1973 Uranium Supply Agreement by reference because of the above quoted language.

UNC argues that Duke and Commonwealth are not parties to this suit, that the rights and obligations as to those two companies as related to UNC cannot be litigated, and that there is nothing in any of the contracts which obligates UNC to arbitrate with GAC with regard to its duties to those two companies.

The trial court found that the Duke and Commonwealth contracts contained no arbitration agreements between GAC and UNC, and concluded that the agreements with the two utilities did not give GAC any right to demand arbitration with UNC.

Since this issue deals solely with GAC's rights to arbitrate with UNC under the terms of the 1973 Uranium Supply Agreement, it is not necessary that we address this issue. GAC has waived whatever arbitration rights it had under the 1973 Uranium Supply Agreement.

8. *Alleged Findings on Issues Not Addressed Below*

GAC complains that the court's finding that *every* extension of time sought by GAC was accompanied by a representation that the extension was needed to prepare for trial is not correct because there is no evidence that

every action was so accompanied. Error is also alleged in the finding by the trial court that UNC had furnished to GAC *all* of the materials to which it was entitled, GAC contending that the evidence indicates that UNC had made inadequate discovery. GAC further complains that there is no evidence in the record to support the finding that the information obtained by GAC in discovery would not otherwise be available to it. It is not shown that there is prejudice to GAC, even if the challenges have merit. We hold that the challenges to these three findings do not constitute material issues that affect the disposition of this case. *Alonso* v. *Hills*, 95 Cal. App.2d 778, 214 P.2d 50 (1950); *Costello* v. *Bowen*, 80 Cal. App.2d 621, 182 P.2d 615 (1947).

It was never intended that the Federal Arbitration Act be used as a means of furthering and extending delays. The policy is to eliminate the delay and expense of extended court proceedings. *Trafalgar Shipping Co.* v. *International Milling Co.*, 401 F.2d 568 (2d Cir. 1968), *Gulf Central Pipeline Co.* v. *Motor Vessel Lake Placid*, 315 F. Supp. 974 (E.D. La. 1970).

This court holds that the critical elements of inconsistent action, unwarranted delay and substantial prejudice are too prevelant in this case to avoid a holding of waiver. Thus, we affirm the decision of the trial court.

IT IS SO ORDERED.

/s/ MACK EASLEY
MACK EASLEY, *Justice*

WE CONCUR:

/s/ DAN SOSA, JR., *Chief Justice*

/s/ H. VERN PAYNE, *Justice*

APPENDIX B

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, a Delaware corporation,

Plaintiff,

v.

GENERAL ATOMIC COMPANY, a partnership composed of GULF OIL CORPORATION and SCALLOP NUCLEAR, INC., et al.,

Defendants.

Decision of the Court

Defendant, General Atomic Company, having filed a motion to stay these proceedings, with Bigbee, Stephenson, Carpenter and Crout appearing as counsel for plaintiff and Rodey, Dickason, Sloan, Akin & Robb; Montgomery, Andrews & Hannahs; and Howrey & Simon appearing as counsel for defendant; the Court having considered the allegations and proof of the parties, argument of counsel and authorities cited, and being otherwise fully advised, finds generally in favor of plaintiff and against defendant and hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff, United Nuclear Corporation (UNC), is a Delaware corporation, and is qualified to do business in New Mexico.

2. Defendant, General Atomic Company (GAC), is a general partnership composed of Gulf Oil Company (Gulf), is a Pennsylvania corporation, and Scallop Nuclear, Inc. (Scallop), a Delaware corporation.

3. On August 8, 1975, an action was filed in the District Court of Santa Fe County, Civil Cause No. 50044, entitled *United Nuclear Corporation* v. *General Atomic Company, Gulf Oil Corporation and Scallop Nuclear, Inc.*, defendants, which cause was removed to the United States District Court for the District of New Mexico, Civil Cause No. 75-582-B. Included within the scope of the issues raised by the complaint in that cause were all issues arising from the 1973 Supply Agreement.

4. On September 11, 1975, GAC, Gulf and Scallop filed a Motion for Extension of Time in Civil Cause No. 75-528-B requesting additional time within which to answer or otherwise plead to UNC's complaint and to answer or object to UNC's interrogatories. As grounds for their motion, movants stated that the time was necessary to determine whether to seek arbitration of the issues. GAC has known at all material times that it had a right to demand arbitration against UNC.

5. On October 6, 1975, Gulf Oil Corporation filed a Motion for Extension of Time in Civil Cause No. 75-528-B, acknowledging in that motion that failure to demand arbitration prior to answering the complaint or filing such answer without asserting the affirmative defense of compulsory arbitration might constitute a waiver of Movant's right compel arbitration.

6. On December 31, 1975, following its voluntary dismissal of Cause No. 75-528-B in the United States District Court for the District of New Mexico, UNC filed suit against GAC in the District Court of Santa Fe County, Civil Cause No. 50827. Interrogatories were served upon GAC simultaneously with service of the complaint. The

complaint and the interrogatories, both virtually identical to those filed in Cause No. 50044, included within their scope all of the issues arising out of the 1973 Uranium Supply Agreement. GAC disqualified, on the grounds of bias, the Honorable Santiago Campos from presiding in said cause.

7. On January 19, 1976, GAC filed a federal interpleader action in United States District Court for the District of New Mexico, Civil Cause No. 76-092-B, against UNC, Duke Power Company (Duke), Commonwealth Edison Company (Commonwealth), Indiana & Michigan Electric Company (I&M) and Detroit Edison Company (Detroit). GAC's complaint, while stating that it was not waiving its right to arbitration, sought judicial determination of the rights and obligations of all the parties in that cause under the 1973 Supply Agreement and the various utility agreements. That cause was dismissed by order entered on March 2, 1976 for lack of subject matter jurisdiction. GAC appealed and the dismissal was affirmed in April of 1977. *General Atomic Co.* v. *Duke Power Co., et al.*, 553 F.2d 53 (10th Cir. 1977).

8. No jurisdictional issue in this cause remains. Jurisdiction of the trial court was affirmed by the New Mexico Supreme Court in an appeal brought by GAC. *United Nuclear Corporation* v. *General Atomic Co.*, 560 P.2d 161 (1976).

9. On May 5, 1976, GAC, after having sought and obtained an extension of time within which to answer, filed its answer to UNC's complaint, and a counterclaim against UNC. In its counterclaim, GAC sought judicial determination of the respective rights and obligations of GAC and UNC under the 1973 Uranium Supply Agreement, an order directing specific performance of those obligations and monetary damages, both compensatory and punitive. GAC also alleged that UNC had violated the New Mexico An-

titrust Statutes, § 49-1-1, *et seq.*, N.M.S.A., 1953 and sought over 1 billion dollars in damages for said violation.

10. In its Eighth Defense contained in its Answer, GAC stated that some of the issues in this case are subject to arbitration and that it anticipated becoming involved in arbitration with Duke Power Company (Duke) and Commonwealth Edison Company (Commonwealth), and wanted UNC to be a party to those proceedings. GAC specifically excluded from the scope of its arbitration demand all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement. GAC further stated that to the extent possible, it intended to conduct the arbitration of the issues jointly with the arbitration of the same issues between the respective power companies and itself.

11. On June 4, 1976, UNC filed its Reply to defendant's counterclaim. At that time, all issues related to the 1973 Supply Agreement were before the court on the pleadings of the parties. All of the issues raised are inextricably intertwined with the antitrust allegations raised by both parties.

12. At no point between the commencement of the first action, filed as Cause No. 50044 in District Court for Santa Fe County, New Mexico, and the filing of the pending Motion for Stay (a period of more than two years), did GAC file a demand for arbitration, petition any court for an order compelling arbitration, petition this court for a stay of proceedings pending arbitration, or in any way manifest its intention or desire to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement.

13. On April 2, 1976, the court preliminarily enjoined GAC, its partners, privies, agents, servants and employees, from filing or prosecuting any other action against UNC in any other forum relating to any of the rights,

claims, or the subject matter of this action. The injunction was sought and issued in the context of GAC's announced intention of instituting litigation against UNC in other jurisdictions and of joining UNC in pending or contemplated arbitration proceedings instituted by the utilities. The preliminary injunction did not prohibit GAC from demanding arbitration with UNC in this forum.

14. Two utilities, Duke and Commonwealth, have demanded arbitration with GAC pursuant to arbitration clauses contained in the Duke and Commonwealth La Salle agreements. These contracts contain no arbitration agreements between GAC and UNC.

15. In December of 1976, GAC moved to join as parties two utilities—I&M and Detroit. I&M consented to joinder and Detroit was joined by order of the Court.

16. Pursuant to its defense against the claims stated by UNC and in attempt to prove the claims stated in its counterclaim, GAC engaged in extensive discovery in this case, taking more than 100 depositions totaling more than 16,000 pages of testimony and involving 2,785 deposition exhibits. GAC copied more than 500,000 pages of documents produced to it during discovery at UNC's corporate offices from early May until June, 1977. GAC also propounded and received answers to two voluminous sets of interrogatories served on UNC.

17. On August 22, 1977, the Pretrial Order was signed. GAC drafted the portion of the Order which related to its claims against UNC. In this Order, GAC did not state arbitration as a defense to the claims arising under the 1973 Supply Agreement, nor did it indicate an intention or a desire to resolve the disputed issues by arbitration rather than litigation.

18. On September 19, 1977, GAC filed a Motion for Partial Summary Judgment. Pursuant to that motion, GAC sought a judicial determination that the 1973 Supply

Agreement was not procured by fraud or coercion, that the Agreement was not in violation of the New Mexico Antitrust Laws, that UNC had subsequently ratified the 1973 Supply Agreement, and that UNC's performance of the 1973 Supply Agreement is not executed on the grounds of commercial impracticability. On October 27, 1977, the court rendered a judicial determination that the Motion for Summary Judgment was not well taken and the Motion was, therefore, denied.

19. On October 31, 1977, the parties to this cause proceeded with the trial on the merits and said trial has continued for more than a month.

20. In numerous instances, GAC has invoked the appellate jurisdicion of the courts of New Mexico by filing appeals or petitioning for writs of prohibition or superintending control relating to jurisdiction of the trial court, failure to disqualify plaintiff's counsel, entry of the preliminary injunction, failure to join indispensable parties, failure to grant a continuance of the trial and to obtain a modification of the preliminary injunction pursuant to the opinion of the United States Supreme Court.

21. GAC has repeatedly during the course of these proceedings, obtained Orders allowing extensions of time to file motions; to respond to motions; to file memoranda; to compel discovery; to respond to discovery at all times representing to the court that such Orders were necessary for its preparation for trial.

22. On November 28, 1977, GAC declared in open court that it intended to pursue relief under the Federal Arbitration Act and requested the court to stay the trial of this case pending resolution of those matters. The court declined to stay proceedings.

23. On November 30, 1977, GAC filed a motion for a stay of all proceedings in this action on the grounds that it had that day demanded arbitration between GAC and

UNC on all issues relating to the validity, enforceability and interpretation of the 1973 Supply Agreement.

24. From the commencement of the original action until the present, UNC has made tremendous expenditures of time, effort and money in the preparation of its case for trial on the merits and in providing to GAC all of the materials which it sought in discovery to which it was entitled under the Rules of Civil Procedure of the State of New Mexico.

25. As a result of its discovery offering undertaken in this judicial proceeding pursuant to the Rules of Civil Procedure of New Mexico, GAC has acquired huge amounts of information from UNC which would not otherwise be available to it.

26. UNC has been prejudiced by GAC's failure to timely demand arbitration and UNC will be irreparably injured if the proceedings in this cause were stayed and arbitration ordered.

27. From the commencement of the original action in August, 1975, until the filing of the present motion, a period of more than 27 months, GAC has, with knowledge of its rights, not demanded, or sought to compel arbitration with UNC. GAC is in default and has voluntarily and intentionally relinquished any rights it may have had to arbitrate with UNC.

28. The arbitration clause contained in Article XVII of the 1973 Supply Agreement is limited in scope to those issues which may be resolved by an application of the terms and conditions of the 1973 Supply Agreement.

29. The 1974 Uranium Concentrates Agreement contains no arbitration clause.

30. There is no just reason to delay the entry of a partial final judgment herein in accordance with these Findings of Fact and Conclusions of Law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to §§22-3-9, *et seq.*, N.M.S.A., 1953 (the Uniform Arbitration Act) or 9 U.S.C. §1 *et seq.* (the Federal Arbitration Act) or both, to determine whether GAC may properly demand arbitration with UNC.

2. GAC has waived any rights to demand arbitration from UNC and has been in default in exercising these purported rights.

3. GAC's motion to stay these proceedings should be denied.

4. GAC has claimed that it is entitled to assert certain rights under the Federal Arbitration Act. This Court's order staying arbitration proceedings shall not in and of itself, operate to preclude GAC from asserting its claimed federal rights in appropriate judicial proceedings. GAC has waived and is in default of all rights it may have had to have its disputes with UNC determined in arbitration.

5. Neither the Duke nor Commonwealth Agreements give GAC any rights to demand arbitration with UNC.

6. The arbitration clause of the 1973 Supply Agreement, if valid, allows only those issues which may be resolved by an application of the terms and conditions of the 1973 Supply Agreement to be submitted to arbitration.

7. The issues arising under the New Mexico Antitrust Laws, § 49-1-1, *et seq.*, N.M.S.A., 1953 may not be submitted to arbitration.

8. All issues in this case are so intertwined with issues arising under the New Mexico Antitrust Laws that none of the issues can properly be submitted to arbitration.

9. There is no just reason to delay the entry of a partial final judgment in accordance with these findings of fact and conclusions of law.

10. The arbitration proceedings heretofore filed by GAC against UNC should be stayed.

/s/ EDWIN L. FELTER
District Judge

APPENDIX C

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION,
a Delaware corporation,
Plaintiff,

v.

GENERAL ATOMIC COMPANY, a partnership composed of
GULF OIL CORPORATION and
SCALLOP NUCLEAR, INC., et al.,
Defendants.

PARTIAL FINAL JUDGMENT

Filed '77 Dec. 27

This matter having come on to be heard before the Court upon defendant General Atomic Company's Motion To Stay Proceedings, the parties having appeared by their respective counsel of record and the Court now being sufficiently advised, and

The Court having thereafter made and entered its findings of fact and conclusions of law in respect to the issues raised by said Motion, and

It further appearing to the Court that pursuant to the provisions of Rule 54 (b) (1) in the New Mexico Rules of Civil Procedures, and the Uniform Arbitration Act, §23-3-9 *et. seq.* N.M.S.A. 1953 (1975 Supp.), and the Federal Arbitration Act, 9 U.S.C. *et. seq.*, there is no just reason for delay in the entry of a partial final judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that General Atomic Company's Motion to Stay Proceedings, be and the same hereby is denied. Provided, however, that this Partial Final Judgment shall not, in an of itself, operate to preclude Defendant General Atomic Company from asserting claimed federal rights in appropriate judicial proceedings.

/s/ Edwin L. Fetter
District Judge

APPENDIX D

Arbitration Clause In The 1973 Supply Agreement

ARTICLE XVII

ARBITRATION

In the event that any disputes, which may arise between the parties during the course of this Agreement, cannot be mutually resolved, either party may elect to submit such disputes to arbitration in accordance with the Rules of the American Arbitration Association. Upon notice of such election, each party shall designate one member of the arbitration panel and the designees shall choose an impartial third member who shall chair the panel.

The panel shall hear and consider the position of each party and shall equitably resolve the dispute by a determination based on the terms and conditions of this Agreement. Such determination shall be final and binding on both parties and judgment upon the award rendered by the Arbitrators may be entered in any Court having jurisdiction thereof.